No. (1)

Supreme Court, U.S.
FILED

In The

98 622 OCT 6 1998

OFFICE OF THE CLERK

Supreme Court of The United States

October Term, 1998

WILLIAM B. FALOW,

Petitioner,

- against -

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

Respondent.

Petition for a Writ of Certiorari to the
Appellate Division - Second Department
of the Supreme Court of the State of New York

PETITION FOR A WRIT OF CERTIORARI

LEON J. GREENSPAN
GREENSPAN & GREENSPAN
Counsel of Record
Attorneys for the Petitioner
34 South Broadway
White Plains, New York 10601
(914) 946-2500

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (6173)

104 pp

QUESTIONS PRESENTED

1. Whether FALOW was deprived of due process by a quasi-criminal disciplinary proceeding resulting in his disbarment, not commenced until 11 months after it was authorized, where the Appellate Division, Second Department of the New York Supreme Court ("Appellate Division") acted as investigator, prosecutor, adjudicator and disciplinor.

2. Whether FALOW was deprived of due process by a quasi-criminal disciplinary proceeding resulting in his disbarment upon recommended findings, including resolution of credibility, by an Appellate Division appointed subsequent referee who neither heard nor saw any of the 44 witnesses but relied only upon the transcript taken before the deceased prior appointed referee.

3. Whether FALOW was deprived of due process by a quasi-criminal disciplinary proceeding where the Appellate Division refused his request to see or use files that it maintained on him in connection therewith; and testimony taken not in his presence and not subject to cross examination were utilized against him so that FALOW was denied an opportunity to establish his constitutionally valid defenses.

4. Whether FALOW was deprived of due process by a quasi-criminal disciplinary proceeding resulting in his disbarment by the Appellate Division utilizing the preponderance rather than clear and convincing evidence standard of proof.

PARTIES

The names of all parties to the proceeding in the Court whose judgment is sought to be here reviewed appear in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES i

TABLE OF CONTENTS ii

APPENDIX iii

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS OF THE COURTS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

ARGUMENT FOR ALLOWANCE OF THE WRIT 9

I. It Violates All Fair Notions of Due Process for the Appellate Division to Investigate, Prosecute, Adjudicate and Discipline an Attorney 9

II. Due Process Requires That There must Be a Hearing De Novo When a Referee Dies Before Rendering His Report 14

III. Due Process Is violated where an attorney is deprived of access to files maintained on him or used by the Appellate Division along with transcripts in other proceedings where neither he nor his counsel were present or permitted to cross-examine 19

IV. A quasi-criminal proceeding should require the utilization of the "clear and convincing evidence" standard of proof 26

Conclusion 30

APPENDIX

A. Appellate Division Order of Disbarment dated 6/23/97 . 1a

B. Court of Appeals sua sponte order dated 10/23/97 ... 8a

C. Appellate Division order denying leave to appeal dated 4/21/98 ..... 10a

D. Court of Appeals order denying leave to appeal dated 7/9/98 ..... 11a

E. Article III §1 of the United States Constitution 13a

F. 14th Amendment to the United States Constitution ... 13a

G. Judiciary Law §90 of New York State 14a

H. Judiciary Law §21 of New York State 29a

I. Appellate Division Rule 691.1 et seq. of New York State 30a

J. Letter to the Appellate Division dated 5/23/91 ..... 50a

K. Appellate Division order denying leave to see material dated 4/15/93 ..... 52a

L. Appellate Division Order of suspension dated 6/10/91 ..... 54a

M. Appellate Division Order revoking suspension dated 8/19/91 ..... 56a

N. Appellate Division Order denying vacatur of order dated 6/10/91 to commence dated 4/15/93 ..... 58a

O. Appellate Division Order appointing George J. Balbach as Special Referee dated 4/15/93 ..... 60a

P. Appellate Division Order quashing subpoenas dated 3/3/95 ..... 62a

Q. Appellate Division Order appointing John A. Monteleone as substitute Special Referee dated 5/6/95 ..... 64a

R. Appellate Division Order denying vacatur of report of referee dated 1/14/97 ..... 66a

S. List of states applying clear and convincing evidence standard 68a

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

United States Constitution 14th Amendment §1 2

United States Constitution Article III §1 2

UNITED STATES STATUTES

28 U.S.C. §1257(a) 1

UNITED STATES CASES

Addington v Texas, 441 U.S. 418, 424-426 (1979) ... 26, 27

Anderson v Liberty Lobby Inc., 477 U.S. 242, 252 (1986) 27

Armstrong v Manzo, 380 U.S. 545, 552 (1965) 12, 25

Barry v Barchi, 443 U.S. 55, 66 (1979) 12

Barsky v Board of Regents, 347 U.S. 442, 459-464, 468-471 (1954) 9, 10, 11, 21

Blackburn v Alabama, 361 U.S. 199, 206 (1960) 20

Brady v Maryland, 373 U.S. 83, 87 (1963) 20

Cafeteria & Restaurant Workers Union v McElroy, 367 U.S. 886, 895 (1991) 12

Clark v Pennsylvania, 128 U.S. 395 (1888) 1

Cohen v California, 403 U.S. 15 (1971) 1

Concrete Pipe and Products of California, Inc. v Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993) 18, 29

Cooke v United States, 267 U.S. 517, 538 (1925) 25

Cruzan v Director, Missouri Dept. of Health, 497 U.S. 261, 282 (1990) 27

Ex parte Bradley, 74 U.S. 364 (1869) 20

Ex parte Burr, 22 U.S. 529 (1824) 9, 26

Ex parte Garland, 71 U.S. 333 (1866) 9

Ex parte Secombe, 60 U.S. 9 (1857) 9, 26

Friedman v New York, 397 U.S. 317 (1970) 11

Goldberg v Kelly, 397 U.S. 254 (1970) 19

Green v McElroy, 360 U.S. 474, 495 (1959) 21, 22

Harrison v Missouri Pacific Railroad Co.,
372 U.S. 248 (1963) 1

In re Murchison, 349 U.S. 133, 136 (1955) 13, 14, 24

In re Oliver, 333 U.S. 257, 258, 263-267, 273,
276-277 (1948) 20

In re Ruffalo, 390 U.S. 544 (1968) 9, 18, 20

In re Winship, 397 U.S. 358, 371-372 (1970) 27

Jefferson v City of Tarrant, ___ U.S. ___,
118 S.Ct. 481 (1997) 1

Keyishian v Board of Regents, 385 U.S. 589 (1967) 11

Law Students Civil Rights Research
Council, Inc. v Wadmond, 401 U.S. 154,
175 (1971) (Black, J., dissenting) 14

Little v Streater, 452 U.S. 1, 12-14 (1981) 21

Marshall v Jerrico, Inc., 446 U.S. 238, 247-248 (1980) 12, 13, 14

Matthews v Eldridge 424 U.S. 319, 335 (1976) 27

Michigan-Wisconsin Pipe Line Co. v Calvert, 347 U.S. 157 (1954) 1

Middlesex City Ethics Committee v Garden State Bar Association, 457 U.S. 423, 432 (1982) 9

Morgan v United States, 298 U.S. 468, 481 (1936) 16

Morrissey v Brewer, 408 U.S. 471, 485-489 (1972) ... 14, 23

New Orleans v De Armas, 34 U.S. 224 (1835) 1

Offutt v United States, 348 U.S. 11, 12 (1954) 13

Peters v Kiff, 407 U.S. 493, 502 (1972) 24

Randall v Brigham, 74 U.S. 523 (1868) 9

Santosky v Kramer, 455 U.S. 745 (1982) 27

United States v Grinnell Corp., 384 U.S. 563, 583 (1966) 23

United States v Salerno, 481 U.S. 739, 741 (1987) 27

United States v United States Gypsum Co., 333 U.S. 364, 395 (1948) 27

Ward v Village of Monroeville, 409 U.S. 57, 61-62 (1972) 14

Willner v Committee on Character and Fitness,
373 U.S. 96, 102, 105-106 (1963) 24

Withrow v Larkin, 421 U.S. 35, 58 (1975) 12, 13, 14

Zauderer v Office of Disciplinary Counsel,
471 U.S. 626 (1985) 28

CIRCUIT COURT CASES

American-Arab Anti-Discrimination Committee v
Reno, 70 F.3d 1045 (9th Cir. 1995) 25

Barbara v New York Stock Exchange, Inc.,
99 F.3d 49, 58 (2d Cir. 1996) 9

Camero v United States, 375 F.2d 777, 780
(Ct. Cl. 1967) 21

Garden State Bar Association v Middlesex County Ethics
Committee, 643 F.2d 119, 124
(3d Cir. 1981), reversed on other grounds,
459 U.S. 423 (1981) 22

Smith v Dental Products Co., 168 F.2d 516,
518-519 (7th Cir. 1948) 16, 18

Sorlucco v New York City Police Department,
971 F.2d 864, 875 (2d Cir. 1992) 18

Sullivan v Dept. of the Navy, 720 F.2d 1266, 1274
(Fed. Cir. 1983) 21, 25

United States v Earley, 746 F.2d 412, 415-417 (8th Cir. 1984) cert. denied 472 U.S. 1010 (1985) 25

DISTRICT COURT CASES

Brown v United States, 377 F.Supp. 530, 539 (N.D. Texas 1974) 25

In re Benjamin, 698 A.2d 434, 437-440 (D.C. App. 1997). 28

Mildner v Gulotta, 405 F. Supp. 182, 188-191 (E.D.N.Y. 1975), aff'd 425 U.S. 901 (1976) 10, 11

Thaler v Casella, 960 F.Supp. 691, 699 (S.D.N.Y. 1997) 5, 13, 26

STATE STATUTES

CPLR §4318 15

CPLR §4320(a) 15

Judiciary Law of the State of New York §21 ..... 2, 14

Judiciary Law of the State of New York §90 . 2, 10, 23, 24, 28

STATE CASES

Devlin v New York, 9 Daly 334 (1880) 15

Eldridge v Wolfe, 129 Misc. 617, 619 (Sup. Ct. Chatauqua Cty, 1927) 15

Falcone v Falcone, 31 Misc.2d 740, 741 (Sup. Ct. N.Y. City, 1961),rev'd on other grounds, 18 A.D.2d 1127 (4th Dept. 1963), app. withdrawn, 13 N.Y.2d 647 (1963) 15

Friedman v State of New York, 24 N.Y.2d 528, 537 (1969) 11

Heerdegen v Loreck, 17 A.D. 515 (1st Dept. 1897) 16

In re Fite, 285 Ala. 666, 235 So.2d 809, 812-813 (Ala. 1970) 19

In re Schlesinger, 404 Pa. 584, 172 A.2d 835 (Pa. 1961) 9, 13

In the Interest of McFall, 533 Pa. 24, 617 A.2d 707, 714 (Pa. 1992) 14

Maicas v Leony, 113 N.Y. 619, 621 (1889) 16

Matter of Altomerianos, 160 A.D.2d 96, 101 (1st Dept. 1990) 17

Matter of an Attorney, 83 N.Y. 164, 166-167 (1880) 19

Matter of Bartholomew, 195 A.D.2d 753, 755, case 1 (3d Dept. 1993) 16

Matter of Benjamin, 205 A.D.2d 978, 980, case 1 (3d Dept. 1994 16

Matter of Block v Ambach, 73 N.Y.2d 323, 332 (1989) 20, 23

Matter of Capoccia, 59 N.Y.2d 549 (1983) 28

Matter of Cohn, 194 A.D.2d 987, 990, case 38 (3d Dept. 1993) 17

Matter of Dondi, 63 N.Y.2d 331, 339 (1984) 23

Matter of Eldridge, 82 N.Y. 161, 167-168 (1880) 19

Matter of Hecht v Monaghan, 307 N.Y. 461, 470 (1954) 13, 20

Matter of Joseph, 125 A.D. 544 (1st Dept. 1908) 19

Matter of Kelso, 61 N.Y.2d 82, 87 (1984) 16

Matter of Levy, 37 N.Y.2d 279, 282 (1975) 26

Matter of Long, 287 N.Y. 449, 456 (1942) 20

Matter of Mathot, 222 N.Y. 8, 10 (1917) 10

Matter of McBernette v Sobol, 83 N.Y.2d 333, 339 (1994) 20

Matter of Murray v Murphy, 24 N.Y.2d 150, 157 (1969) 20

Matter of Padilla, 67 N.Y.2d 440 (1986) 28

Matter of Quesada, 196 A.D.2d 324, 326 (1st Dept. 1994) 17

Matter of Schlesinger, 404 Pa. 584 (1961) 11, 12, 13

Matter of Shea, 271 A.D. 594 (1st Dept. 1946) 15, 16

Matter of State -- Office of Mental Retardation & Development Disability v Mastracci, 77 A.D.2d 473, 475-476 (4th Dept. 1980) 23

Murphy v Murphy, 144 A.D.2d 904, (4th Dept. 1988) 15

Pasik v State Board of Law Examiners, 102 A.D.2d 395, 398 (1st Dept. 1984) 23

People ex rel Central New England Ry Co. v State Tax Comm., 261 A.D. 1015, 1016 (3d Dept. 1941) 15

People ex rel Reiter v Lupe, 405 Ill. 66, 89 N.E.2d 824, 826-827 (1950) 16

People v Gissendanner, 48 N.Y.2d 543, 548 (1979) 24

People v Rosario, 9 N.Y.2d 286 (1961) 24

People v White, 309 N.Y. 636, 641 (1956), cert. denied 352 U.S. 849 (1956) 19

Rosenberg v Rae, 24 A.D.2d 612, case 46 (2d Dept. 1965) 20

Sharkey v Thurston, 268 N.Y. 123, 126 (1935) 13

State v General Electric Co., 215 A.D.2d 928-929, case 31 (3d Dept. 1995) 18, 19

MISCELLANEOUS AUTHORITIES

Appellate Division Rule §691
[22 NYCRR §691 et seq.] 2, 10, 21, 23, 28

Lott, Balancing Burdens of Proof and Relevant
Conduct: At what Point Is Due Process Violated?
45 Baylor L. Rev. Fall, 1993 27

OPINIONS AND ORDERS OF THE COURTS BELOW

The Appellate Division, Second Department, of the Supreme Court of the State of New York ("Appellate Division") ordered the disbarment of petitioner WILLIAM B. FALOW ("FALOW") by way of its opinion and order dated June 23, 1997, 231 A.D.2d 201 (2d Dept. 1997) (Appendix A). The Court of Appeals of the State of New York ("Court of Appeals") on October 23, 1997, dismissed, *sua sponte*, an appeal erroneously as of right by FALOW 90 N.Y.2d 1007 (1997) (Appendix B). Thereafter, in an unreported decision and order dated April 21, 1998, the Appellate Division denied leave to appeal to the Court of Appeals (Appendix C). Finally, by decision and order dated July 9, 1998, the Court of Appeals denied leave to appeal thereto, 1998 NY Lexis 2264 (Appendix D).

JURISDICTION

The Appellate Division entered its order disbarring FALOW on June 23, 1997. The Court of Appeals denied leave to appeal on July 9, 1998. There was no application sought nor order obtained respecting rehearing. There was no need to apply for an order granting an extension of time as this petition is timely filed.

This Court has jurisdiction to review the judgment and order in question on a writ of certiorari pursuant to 28 U.S.C. §1257(a), this petition having been timely filed within 90 days of the July 9, 1998 order of the New York Court of Appeals denying leave to appeal thereto. It is a final order, as is the order of the Appellate Division, subject to no further state court review. New Orleans v De Armas, 34 U.S. 224 (1835); Clark v Pennsylvania, 128 U.S. 395 (1888); Michigan-Wisconsin Pipe Line Co. v Calvert, 347 U.S. 157 (1954); Harrison v Missouri Pacific Railroad Co., 372 U.S. 248 (1963); Cohen v California, 403 U.S. 15 (1971) and Jefferson v City of Tarrant, ___ U.S. ___, 118

S.Ct. 481 (1997).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution Article III §1 (Appendix E)
United States Constitution 14th Amendment §1 (Appendix F)
Judiciary Law of the State of New York §90 (Appendix G)
Judiciary Law of the State of New York §21 (Appendix H)
Appellate Division Rule 691.4 (Appendix I)

STATEMENT OF THE CASE

The law and procedure of the state of New York which resolutely protect the public in matters both civil and criminal are, nevertheless, cast aside in an attorney disciplinary prosecution. They are beyond the reach of an attorney seeking to defend his license to practice law and his very livelihood. This application presents the Court with the rare opportunity to articulate the procedural and substantive due process rights of an attorney in disciplinary proceedings. Review is necessary as most of the relatively few number of cases addressing this issue were decided in the 19th Century. A decision from our nation's highest court will reach beyond the borders of New York State and significantly impact upon the rights in disciplinary proceedings of attorneys throughout the nation.

Pursuant to Rule 22 NYCRR §691 et seq. promulgated by the Appellate Division pursuant to its authority as set forth in §90 of the New York Judiciary Law, the Grievance Committee for the Ninth Judicial District ("Committee") applied to the Appellate Division for an order authorizing the commencement of a disciplinary proceeding against FALOW. The Committee sought and initially obtained an order dated June 10, 1991 immediately suspending FALOW from the practice of law pending the outcome of the disciplinary proceeding (Appendix L). Thereafter, upon application by FALOW, summary suspension was vacated

by the Appellate Division by order dated August 19, 1991 (Appendix M) and FALOW was reinstated to the practice of law pending its outcome.

Not until May 6, 1992, some eleven (11) months after the Appellate Division order authorizing commencement, did the Committee serve FALOW with notice and petition setting forth 30 charges of professional misconduct. None of these charges involved the taking of any money or alleged any criminal conduct on the part of FALOW. Instead, the charges asserted that FALOW misled the court, clients and others while engaging in self-dealing. FALOW was accused of misrepresentation to the Committee by way of deposition testimony in addition to charges of other wrongdoing. FALOW was also accused of acting in concert with two other attorneys, and by reason thereof, the Committee sought a joint hearing, properly denied by order dated November 9, 1992.

FALOW applied to the Appellate Division on December 10, 1992 for an order dismissing the petition, alleging ex-parte communication by the Committee with the Court. He also sought disclosure by way of depositions of specified individuals. On January 8, 1993, FALOW sought to vacate the order which authorized the commencement of the disciplinary proceeding, along with disclosure of the private file he discovered had been improperly maintained on him by the Appellate Division. All of the relief sought was denied by the Appellate Division on April 15, 1993 (Appendix N). Nevertheless, the court had such material before it for utilization in its rulings. On that same date, the Appellate Division appointed the late George J. Balbach to hear and report as referee (Appendix O). On or about May 4, 1993, FALOW served his answer to the Committee's petition asserting, inter alia, constitutional defenses.

By order dated July 9, 1993, the Court of Appeals denied an application by FALOW for leave to appeal these orders.

Thereafter, preliminary conferences were held before the referee on September 9, and October 25, 1993 with hearings commenced on January 25, 1994 but not concluded until December 28, 1995. While the disciplinary proceedings were pending, FALOW applied to the Appellate Division for the issuance of subpoenas for the records maintained by the Appellate Division and for the appearance of certain designated court personnel, which application was denied by order of the Appellate Division dated March 3, 1995 (Appendix P). Thereafter, the referee quashed the attempt by FALOW to enforce subpoenas issued by his then counsel. The referee had earlier claimed that he had no authority to issue subpoenas.

FALOW's defense was significantly impaired due to the length of the hearings and the delay between authorization, commencement and conclusion, as a number of witnesses FALOW proposed to present on his behalf died. These witnesses would have contradicted adverse testimony on many issues decided against FALOW. Where witnesses were presented by FALOW contradicting adverse Committee witnesses and proof, many of those issues were decided in favor of FALOW. The delay was highly prejudicial.

Though FALOW raised constitutional defenses in his answer and the order appointing the referee ordered him to consider FALOW's answer, referee Balbach refused to permit FALOW to take testimony and introduce evidence to substantiate his constitutional claims.

On or about February 22, 1996, the Committee submitted proposed findings to the late referee followed by submission on March 26, 1996 by FALOW of a post-trial memorandum wherein he raised the issue of the standard of proof in the disciplinary proceeding. The Committee responded thereto on or about April 3, 1996. Unfortunately, before action could be taken, referee Balbach died and the Appellate Division appointed as

subsequent referee John A. Monteleone, charged, as was the late referee Balbach, with the duty to hear and report. The order of replacement came on May 6, 1996 (Appendix Q).

Surprisingly, the subsequent referee held no hearings and heard no testimony. The subsequent referee notified neither FALOW nor the Committee that the hearings were closed. The referee concealed from the parties that his report would only be based upon his review of the transcripts and exhibits generated by the previous hearings. Instead, the subsequent referee merely reviewed the transcript and examined the documents. He then submitted a report dated August 30, 1996. The Committee moved to confirm in part and disafirm in part followed by an application by FALOW on October 15, 1996 to vacate the report and direct a hearing de novo. This was followed by his application on October 25, 1996 to affirm in part and disafirm in part the subject report. The Appellate Division denied FALOW's application on January 14, 1997 (Appendix R).

In sum, the entire proceeding, from authorization until disbarment took some seven years, followed by an unsuccessful one year struggle in the Appellate Division and Court of Appeals, to obtain Appellate review. It is thus clear, from the foregoing brief summary, that FALOW laid before the New York Courts, in a timely and appropriate manner, the constitutional issues underlying the application to this Court for the issuance of a writ of certiorari. See to that effect, Thaler v Casella, 960 F.Supp. 691, 699 (S.D.N.Y. 1997). Without question, FALOW specified how he was deprived of due process.

FALOW has clearly shown the basis for his claim that the Appellate Division acted as investigator, prosecutor, adjudicator and disciplinor. The vital issue of witness credibility, dispositive of all charges against FALOW, was never determined by the only trier of fact who actually saw and heard the testimony. FALOW has shown that the Appellate Division resolved

credibility without having heard or seen any of the witnesses, relying instead upon the recommended finding of a subsequently appointed referee who neither heard nor saw the witnesses; but instead who relied upon the transcript and the documents taken before the deceased first appointed referee.

FALOW has demonstrated that the Appellate Division: refused his request to see or use files that it maintained on him; refused to issue subpoenas; permitted the use of hearsay testimony from other proceedings -- when neither FALOW nor his counsel were present thereat -- to be read into the record and relied upon same in resolving credibility issues. Finally, FALOW timely raised the issue of the constitutionality of the proceedings conducted, wherein the standard of proof utilized was that of preponderance rather than that of clear and convincing evidence, despite the fact that disciplinary proceedings are quasi-criminal in nature.

Even the most cursory review of the record reveals that numerous and substantial questions of fact arose because of the conflicting testimony of the witnesses. The ambiguity of certain of the documentary exhibits merely added to the difficulty of credibility let alone factual resolution. Questions of fact could not be properly resolved except by hearing as well as seeing the witnesses and examining the documentary evidence in the light thereof. The delay in commencement after authorization and the delay in conclusion resulted in the death of witnesses favorable to FALOW which greatly prejudiced his ability to defend against the charges. The failure of the subsequent referee to hold hearings was a deprivation of due process as well as a violation of New York Law. The Appellate Division is a fact court. However, it must rely upon the trial court resolution of credibility issues. In that sense, the Appellate Division was in no better a position to determine credibility than the subsequently appointed referee who purported to so do.

Constitutionally mandated procedural due process cried out for de novo hearings. There were differing resolutions of the issues available. The subsequent referee made findings sustaining in part and denying in part charges submitted by the Committee. The Appellate Division, reading the same transcript and examining the same documents, reached a different conclusion than did the subsequent referee. The referee sustained part of charges 1 and 2, and all of charges 4 through 6, 8 through 11, 14, 19 and 26 through 30. He failed to sustained portions of charges 1 and 2 as well as all of charges 3, 7, 12, 13, 17, 18 and 21 through 25. Charges 15, 16 and 20 were withdrawn.

For its part, the Appellate Division was silent with regard to charge 1, but sustained charges 2 through 5, 7 through 10, 12 through 14, 18, 19, 23, 25 and 27 through 29. It sustained charge 26 solely with respect to failing account for the funds of clients and third parties. The Appellate Division did not sustain charges 1, 6, 11, 17, 21, 22, 24, part of 26, and 30. It differed from the referee with regard to charges 2, 3, 6, 7, 11, 12, 13, 18, 23, 25 and 30. The Appellate Division disagreement overruled the failure of the referee to sustain parts of charge 2, as well as all of charges 3, 7, 12, 13, 18, 23, 25. However, it overruled the referee by not sustaining charges 6, 11, 26 and 30.

The standard of proof utilized was preponderance as opposed to clear and convincing evidence. A preponderance standard should have no place in attorney disciplinary matters. It is manifest that significant issues were present as to whether FALOW was dishonest or merely negligent in his dealings with clients and third parties. Many of the acts described in the charges and the testimony were ambiguous. The specific intent with which the acts were done would be controlling as to whether there was any wrong doing, let alone wrong doing rising to a level requiring the discipline of disbarment. The specific intent with which the acts were done would be determinative of

guilt or innocense. There was no competent evidence of conversion or misappropriation of the funds of clients or third parties. Innocent inferences could easily be drawn from FALOW's conduct depending upon his intent. There were hotly contested issues as to whether any wrongful commingling took place. Since the charges rose to the level of accusations of venal intent, fraud or dishonesty – due process requires that the proof necessary to convict should be clear and convincing – a standard applied by the vast majority of states (Appendix S).

This application calls into question the entire disciplinary procedure as it presently exists in the state of New York. The Appellate Division acts as investigator, prosecutor, adjudicator and disciplinor. It appoints the Committee. The Committee investigates and then receives permission from the Appellate Division to prosecute. The Appellate Division appoints the referee to hear and report. Thus, the appointed Committee prosecutes and the appointed referee hears and recommends. The Appellate Division, finds the facts and adjudicates guilt. Upon adjudication of guilt, it imposes discipline. We thus have bundled into one entity, all of the functions which, by constitutional mandate – are to be divided between independent entities. It is the epitome of unfairness to have one entity assume all juridical functions.

For reasons never articulated, neither the New York courts, the Committee nor any spokesman thereof has ever satisfactorily explained the failure to provide FALOW with files kept on him by the Appellate Division. Surely, he has an absolute right to such material. Surely, the Appellate Division, would be most desirous of allowing him to see the same if the material were innocuous – indicative of neither guilt nor innocence. All of these issues were timely raised below. They are ripe for resolution. The writ of certiorari should be issued.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. It Violates All Fair Notions of Due Process for the Appellate Division to Investigate, Prosecute, Adjudicate and Discipline an Attorney

Both the admission as well as the removal of attorneys are judicial acts. Randall v Brigham, 74 U.S. 523 (1868). The removal procedure is quasi-criminal in nature and disbarment is a punishment or penalty imposed on the lawyer. In re Ruffalo, 390 U.S. 544 (1968). Of course, the power to disbar an attorney is incidental to all courts in the exercise of proper management. Ex parte Burr, 22 U.S. 529 (1824). The right to practice law should not be lightly taken away. Rather, the right of the Court to disbar must be exercised with sound judicial discretion. Ex parte Secombe, 60 U.S. 9 (1857). The over-riding rule, of course, is that an attorney is entitled to meaningful procedural due process. Ex parte Garland, 71 U.S. 333 (1866).

Disciplinary proceedings are judicial in nature so that the filing of a complaint with the Committee is in effect a filing with the court. Middlesex Cty. Ethics Committee v Garden State Bar Association, 457 U.S. 423, 432 (1982). It is the very antithesis of fair proceedings, where the judiciary imposing punishment after its adjudication is also the same instrument for prior investigation and prosecution. Disciplinary Committees act in a "quasi-public adjudicatory or prosecutorial capacity." Barbara v New York Stock Exchange, Inc., 99 F.3d 49, 58 (2d Cir. 1996). Accord: Dissent by Justice Black, joined by Justice Douglas, Barksey v Board of Regents, 347 U.S. 442, 459-464 (1954).

The procedure utilized in New York by the Appellate Division, is very similar to the procedure which had been utilized in the Commonwealth of Pennsylvania before it was struck down by its Supreme Court. In re Schlesinger, 404 Pa. 584, 172 A.2d 835 (Pa. 1961). The New York procedure, as it was in 1975 and is

today, was accurately described by Judge Neaher in the district court decision, Mildner v Gulotta, 405 F. Supp. 182, 188-191 (E.D.N.Y. 1975), aff'd 425 U.S. 901 (1976). It was soundly criticized by Judge Weinstein in his dissent. Id. at 201-229.

In New York, the report is filed, containing recommended dispositions of the charges which, of necessity, are based upon credibility resolution -- especially where there were opposing witnesses as to the transactions underlying the charges. The Court adjudicates and disciplines, sustaining or disaffirming the various charges, relying upon credibility resolution by the referee. On the motions to confirm and disaffirm, there are no oral arguments. The Court does not have to state its reasons for its findings. There is no right of appeal to the New York Court of Appeals. Matter of Mathot, 222 N.Y. 8, 10 (1917).

Mildner v Gulotta, came to this Court and was affirmed on the majority opinion in the three judge lower court, holding that the lack of a meaningful appeal from the order of the Appellate Division, as of right, was not in and of itself violative of procedural due process. The constitutionality of a lack of a meaningful effective appeal was questioned by the dissenting opinion in Barsky v Board of Regents, 347 U.S. 442, 459-464 (1954). Thus, despite the fact that Judge Weinstein, in his dissenting opinion, laid bare the constitutional infirmities of §90 of the New York Judiciary Law and the implementing procedure of the Appellate Division, now Rule §691 et. seq., this Court did not have to reach the conclusion that the statute and implementing rule, either as written or as applied, were an unconstitutional deprivation of due process to the attorney by utilization of the procedure then and now in full force and effect in the state of New York. Unlike the position articulated in Mildner v Gulotta, this petition by FALOW squarely sets forth the unconstitutional aspect of §90 of the Judiciary Law and Appellate Division Rule §691 et. seq., not only as written, but as applied. Lack of a meaningful appeal is not at issue.

This Court was asked to consider an analogous proposition but declined to so do in Friedman v New York, 397 U.S. 317 (1970). The court dismissed an appeal wherein the claim was made that the then constitutionally mandated New York Court on the Judiciary, charged with removing and retiring judges, violated due process by acting simultaneously as complainant, prosecutor and judge. Friedman v State of New York, 24 N.Y.2d 528, 537 (1969). However, the ruling by the New York Court of Appeals, which this Court let stand, was not without a vigorous dissent by Judge Burke which completely refuted the arguments set forth in the majority opinion. Id. at 544-549, citing with approval Matter of Schlesinger, 404 Pa. 584 (1961). The Supreme Court is now presented with the opportunity to make the right determination for the right reason, albeit here for an attorney, rather than there for a judge!

In the Schlesinger case, the functions of prosecutor, judge and jury on misconduct charges were combined in the Committee On Offenses of the Court of Common Pleas which lodged, prosecuted and, through its Subcommittee, adjudicated the charges. Thereafter, the Court, without hearing witnesses, entered a disbarment order, albeit the Court permitted the attorney to file exceptions to the Committee report. It appears that the procedure utilized in Pennsylvania, disproved by its Supreme Court, is very, very close to if not precisely, the unconstitutional procedure utilized by the Appellate Division herein, well criticized by Judge Burke in Friedman v State of New York and Judge Weinstein in Mildner v Gulotta. Cf. Dissenting Opinion of Justice Frankfurter in Barsky v Board of Regents, 347 U.S. 442, 468-471 (1954).

In Schlesinger, the attorney was prosecuted and disbarment sought because he was a member of the communist party espousing the communist party line. Obviously, this did not merit disbarment then or now. Keyishian v Board of Regents, 385 U.S. 589 (1967). In Schlesinger, the procedure used was

to have the Committee, an arm of the Court of Common Pleas, lodge a written complaint against the attorney. Hearings were held thereon by a Subcommittee of the Committee. A report was rendered and the Court of Common Pleas entered an order of disbarment. Schlesinger, Op. Cit. 172 A.2d at 836.

Here, in this case, we have the Appellate Division, through its appointed Committee, investigating FALOW, and with the permission of the Appellate Division, instituting and prosecuting charges against him through its appointed counsel for the Committee. The Appellate Division, through its referee appointed to hear and report, saw and heard witnesses and examined documents. Thereafter, that referee died without rendering a report. The Appellate Division then appointed a subsequent referee who only read the transcript, looked at the exhibits but never saw, heard nor experienced any live witness testimony. Nevertheless, this subsequent referee rendered a report with recommended findings. As such, there was no opportunity to be heard by this referee in a meaningful manner at a meaningful time. Armstrong v Manzo, 380 U.S. 545, 552 (1965). The proceedings were so delayed as to deny FALOW a hearing in a meaningful time. Cf. Barry v Barchi, 443 U.S. 55, 66 (1979). Thereafter, the Appellate Division found facts, adjudicated and disciplined.

Due process is flexible and calls for procedural protection necessary to particular circumstances. Cafeteria & Restaurant Workers Union v McElroy, 367 U.S. 886, 895 (1991). However, even a flexible interpretation of due process calls for separation of the various functions surrounding lawyer discipline -- not bundling them in one entity. This Court had earlier warned against such procedure in Withrow v Larkin, 421 U.S. 35, 58 (1975). Nevertheless, it held constitutional, adjudicative and investigatory functions in one entity as to physician discipline where the prosecutorial function was independently handled by the District Attorney. Cf. Marshall v Jerrico, Inc., 446 U.S. 238,

247-248 (1980). The Court criticized a procedure where the entity adjudicating was the entity initially determining in the absence of a de facto review of all factual and legal issues. An entity performing even a quasi-judicial function, hearing witnesses, resolving disputed legal and factual issues, cannot also be a prosecutor. Id. at 247. Indeed, the counsel for the Committee and his law clerk are cloaked with judicial immunity. Thaler v Casella, 960 F. Supp. 691, 699-700 (S.D.N.Y. 1997). The Committee is part of the judicial arm of the state. Id. at 700.

As in Schlesinger, counsel for FALOW filed exceptions to the report and recommendation. The Appellate Division adjudicated and ordered FALOW disbarred. The bundling of investigatory and adjudicatory functions, though found to be constitutional, was susceptible to a high risk of unfairness even though there was an independent prosecutor. Withrow v Larkin, 421 U.S. 35, 58 (1975). The lack of same, resulting in complete bundling of functions here, cannot pass due process muster. Such procedure was not "a fair trial in a fair tribunal". It presented neither the appearance nor the reality of justice. As such, it violated the basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955). In the long run, "justice must satisfy the appearance of justice." Offutt v United States, 348 U.S. 11, 12 (1954). Sharkey v Thurston, 268 N.Y. 123, 126 (1935).

As Judge Benjamin R. Jones put it, "This Committee, even though acting with the best of intentions, could not sit in the triple capacity of prosecutor, judge and jury." Schlesinger, Op. Cit. 172 A.2d at 850. The unfair procedure employed in Schlesinger is starkly analogous to the unfair and unconstitutional procedure afforded FALOW. They are legally congruent (Appendices A and K through R). That the result would be the same had due process been afforded is no answer to the lack thereof. Matter of Hecht v Monaghan, 307 N.Y. 461, 470 (1954).

This Court, in In re Murchison, 349 U.S. 133, 137 (1955),

recognized that the concept of a fair trial is too important to our free society to let the prosecuting judges be trial judges of the charges they prefer. Id. at 137. This Court clearly stated its view in the Withrow v Larkin opinion by Mr. Justice White (421 U.S. 35 at 58). He warned that allowing a decision maker to review and evaluate his own prior decisions raises problems. Those problems are surely present here in FALOW where the Appellate Division has done just that -- review its own decisions as well as perform all of the other functions so starkly proscribed as non-performable, constitutionally, by one entity. There was no neutral and detached hearing body. There was no hearing by an entity not directly involved in the decision to prosecute. Thus, a parole violator gets a fairer hearing than an attorney. Morrissey v Brewer, 408 U.S. 471, 485-489 (1972). Despite the anti-lawyer climate, an attorney is still a first class citizen. Surely, the Appellate Division was not impartial. Cf. Law Students Civil Rights Research Council, Inc. v Wadmond, 401 U.S. 154, 175 (1971) (Black, J., dissenting).

"A tribunal is either fair or unfair. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings." In the Interest of McFall, 533 Pa. 24, 617 A.2d 707, 714 (Pa. 1992). FALOW was not tried before a neutral tribunal. Ward v Village of Monroeville, 409 U.S. 57, 61-62 (1972). "Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator." Id. at 61. Justice must satisfy the appearance of justice. Marshall v Jerrico, Inc., 446 U.S. 238, 242 (1980). The ends do not justify the means. This Court should take certiorari and overturn the disbarment of FALOW.

II. Due Process Requires That There must Be a Hearing De Novo When a Referee Dies Before Rendering His Report

The inability of a subsequent referee in New York to report without hearing witnesses is explicitly stated. Judiciary Law §21.

CPLR §§4318 and 4320(a) require that the referee conduct the trial in the same manner as a court trying the issue without a jury. The referee must hold a hearing. Murphy v Murphy, 144 A.D.2d 904, (4th Dept. 1988). The New York rule does not permit a subsequent judge to make the verdict, report, decision or determination of a motion or proceeding where the subsequent judge did not hear and see the witnesses. People ex rel Central New England Ry Co. v State Tax Comm., 261 A.D. 1015, 1016 (3d Dept. 1941); Devlin v New York, 9 Daly 334 (1880).

Only if the parties stipulate, may a subsequent referee decide the case on the record before the deceased referee. Eldridge v Wolfe, 129 Misc. 617, 619 (Sup. Ct. Chatauqua Cty, 1927); Falcone v Falcone, 31 Misc.2d 740, 741 (Sup. Ct. N.Y. Cty, 1961),rev'd on other grounds, 18 A.D.2d 1127 (4th Dept. 1963), app. withdrawn, 13 N.Y.2d 647 (1963). FALOW did not stipulate. Even where stipulated by the parties after the death of a referee, the court, in Matter of Shea, 271 A.D. 594 (1st Dept. 1946) ordered a de novo trial because of credibility issues. The court would not read the record and rule thereon. Violating this rule, the Appellate Division deprived FALOW of due process.

The report of Judge Monteleone acknowledges that the transcript he reviewed reflected 24 hearing dates where testimony was taken over a two year period, all before his appointment. There were 44 witnesses heard by the late Judge Balbach not seen or heard by Judge Monteleone as reflected in an 1890 page transcript. Judge Balbach clearly recognized his function. At page 961 of the transcript he stated in response to a request to strike testimony: "I am the jury."

There were 665 exhibits in the record. Witnesses offered hotly contested conflicting testimony as to the evidence and the exhibits before Judge Balbach. Judge Monteleone only saw the transcript and exhibits. The court as well as FALOW and the

Committee were denied the benefit of Judge Monteleone's employment of all of his faculties in resolving credibility conflicts necessary to making recommended factual findings. Simply stated, there is no authority to support the position that a subsequent judge may render a decision based upon a review of testimony he has not heard from witnesses he has not seen. The rule is universally logical and everywhere accepted. People ex rel Reiter v Lupe, 405 Ill. 66, 89 N.E.2d 824, 826-827 (1950). There must be a de novo hearing. Maicas v Leony, 113 N.Y. 619, 621 (1889). The procedure utilized is constitutionally, as well as statutorily, infirm. Heerdegen v Loreck, 17 A.D. 515 (1st Dept. 1897).

The Appellate Division exercises its fact finding authority based upon an acceptance of resolution by the referee of credibility questions, unless, as a matter of law, the resolution thereof by the credibility determining referee cannot be accepted. Matter of Shea, 271 A.D. 594, 595 (1st Dept. 1946). Any process other than having the one who heard and saw the witnesses decide credibility is not due process and, as such, is constitutionally infirm. How else can you logically resolve the question: "Whom do you believe?" Appointed referees cannot have greater juridical powers than judges. Referees have no greater powers of credibility resolution than judges! Without question, it is the function of the appointed referee to ascertain the truth or falsity, as well as the competency of the evidence which is presented before him in rendering his report. Manifestly, he must hear and see in order to resolve credibility. Morgan v United States, 298 U.S. 468, 481 (1936). Smith v Dental Products Co., 168 F.2d 516, 518-519 (7th Cir. 1948).

In the absence of wrongful intent or harm to any client, the court or third party, there is no proof of wrongdoing. Matter of Kelso, 61 N.Y.2d 82, 87 (1984). No one was mislead. Matter of Benjamin, 205 A.D.2d 978, 980, case 1 (3d Dept. 1994; Matter of Bartholomew, 195 A.D.2d 753, 755, case 1 (3d Dept. 1993).

In the absence of wrongdoing, disbarment is clearly unwarranted. A fair hearing would have cleared FALOW.

Since credibility was crucial to fact finding resolution by the Appellate Division and there was no such resolution by any one who heard or saw the witnesses, it could not logically, legally, let alone constitutionally, assess the truth. It follows that the Appellate Division could not ascertain the required elements of venal intent, scienter or intent to deceive, let alone find any intent to harm anyone if it could not resolve sharp conflicts in testimony by determining credibility of the conflicting witnesses. Matter of Altomerianos, 160 A.D.2d 96, 101 (1st Dept. 1990); Matter of Cohn, 194 A.D.2d 987, 990, case 38 (3d Dept. 1993); Matter of Quesada, 196 A.D.2d 324, 326 (1st Dept. 1994). The process employed was constitutionally infirm and deprived FALOW of due process.

If the law does not require a referee to perform the "hear" function, than lawyers have less rights than criminals. We can eliminate the need for a referee to perform any function in the nature of a "hearing". Instead, time, effort and money, could all be saved by having the witnesses deposed and the transcripts obtained submitted to this "non-hearing" referee along with the exhibits identified -- and permit such "non-hearing" referee to make recommendations so that the Appellate Division could perform its fact finding function.

Carrying this proposition to its logical conclusion, we could dispense with all trials both civil and criminal as we know them today and permit both judges and juries to render determinations and verdicts based solely and wholly upon review of deposition transcripts; and dispense with any requirement that witnesses be seen, heard or experienced. Such is the peril of permitting the New York attorney disciplinary procedure as applied to FALOW to remain unfettered, because the absurdity of the latter has been brought to bear in the former.

Surely, if given the opportunity, this Court will conclude that credibility issues cannot be resolved by one who has not heard, seen or experienced the witness. Concrete Pipe and Products of California, Inc. v Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993). While a judge can be substituted in a jury trial, mid stream, the jury cannot! Nor can a judge overrule the credibility findings of a jury, thereby substituting his own notions thereof. Sorlucco v New York City Police Department, 971 F.2d 864, 875 (2d Cir. 1992). The same is true of an appellate court unless the finding was totally unreasonable whatever the required degree of proof. Concrete Pipe, op cit 508 U.S. 602 at 623. The Appellate Division in a quasi-criminal disciplinary proceeding is no exception.

The claimed failure to timely object to the procedure employed by the Appellate Division in appointing a second referee who chose not to hear the testimony de novo could not be waived merely by inaction on the part of FALOW. State v General Electric Co., 215 A.D.2d 928-929, case 31 (3d Dept. 1995). How was he then to know, immediately upon appointment of the second referee, that there would be no new hearings? Giving up such a valuable procedural safeguard could only be accomplished by a direct and knowing waiver and not by inaction. FALOW had no notice that the subsequent referee would hold no hearings nor did he agree to waive them. This procedure is repugnant to notions of due process. Smith v Dental Products Co., Inc., 168 F.2d 516, 518-519 (7th Cir. 1948). In light of the statutory authority and applicable case law, it is clear that FALOW was deprived of the due process to which all attorneys are entitled before the license to practice law is taken away. In re Ruffalo, 390 U.S. 544 (1968).

III. Due Process Is violated where an attorney is deprived of access to files maintained on him or used by the Appellate Division along with transcripts in other proceedings where neither he nor his counsel were present or permitted to cross-examine

The Appellate Division reviews the case only from a typewritten record. Consequently, if some of the testimony upon which the second referee arrived at his findings was not adduced in the presence of the deceased first referee, or the second referee, as here, neither the first nor the second referee was in a position to judge the weight and credibility to be given. Due process does not allow for a hearing where the accused party does not know what evidence is being offered or given an opportunity to test, explain or refute such evidence. Goldberg v Kelly, 397 U.S. 254 (1970). Logically, the Appellate Division was in no better a position. No live judge or referee saw or heard any witness. No live judge could determine credibility since none heard nor saw the witnesses. State v General Electric Co., 215 A.D.2d 928, 929, case 31 (2d Dept. 1995). Such practice violated New York practice of long standing – including attorney discipline. Matter of Eldridge, 82 N.Y. 161, 167-168 (1880); Accord: Matter of an Attorney, 83 N.Y. 164, 166-167 (1880); Matter of Joseph, 125 A.D. 544 (1st Dept. 1908). It is constitutionally infirm. See In re Fite, 285 Ala. 666, 235 So.2d 809, 812-813 (Ala. 1970) where the disbarment of an attorney was reversed based upon an unsworn and, therefore inadmissable deposition relied on by the Committee and used as a basis for its findings. Due process does not require a court to accept as true even sworn allegations. People v White, 309 N.Y. 636, 641 (1956), cert. denied 352 U.S. 849 (1956).

One of the fundamental tenets of American jurisprudence is the notion that the accused in a criminal-like prosecutorial setting is entitled to face the accuser and to have access to accusatory

material. Due process forbids the deprivation of rights because of uncharged misconduct. Matter of Block v Ambach, 73 N.Y.2d 323, 332 (1989). Thus, use of transcripts in another hearing of the testimony of witnesses where neither FALOW nor counsel was present, as was the case here, is a denial of due process. Matter of Long, 287 N.Y. 449, 456 (1942). Due process forbids fundamental unfairness in the use of evidence, true or false. Blackburn v Alabama, 361 U.S. 199, 206 (1960). The deceased referee permitted counsel for the Committee to read in testimony by both FALOW's son, Lance, and one Howard Thaler taken at separate investigatory hearings of Lance and Thaler, unattended by FALOW or his counsel. Such procedure is constitutionally infirm. In re Oliver, 333 U.S. 257, 258, 263-267, 273, 276-277 (1948). All evidence must be adduced in the presence of the parties and counsel. There is no way to cross-examine or confront a "transcript." Cf. Matter of Hecht v Monaghan, 307 N.Y. 461, 473 (1954).

An equally accepted notion of due process, as articulated in Brady v Maryland, 373 U.S. 83, 87 (1963), requires that the prosecution make available to the defendant, in a criminal case, information and material which could be considered exculpatory. FALOW was entitled to inspect documents and offer evidence in rebuttal after being fully apprised of the claims. Evidence cannot be withheld. Matter of McBernette v Sobol, 83 N.Y.2d 333, 339 (1994). Cf. Rosenberg v Rae, 24 A.D.2d 612, case 46 (2d Dept. 1965) where the court reversed a judgment in a mortgage foreclosure proceeding because the referee telephoned a witness for the purpose of ascertaining what the witness knew, all in the absence of the parties or counsel. An attorney cannot be charged with one offense and punished for another. Ex-parte Bradley, 74 U.S. 364 (1869); Matter of Murray v Murphy, 24 N.Y.2d 150, 157 (1969). The proceedings should not be a trap. In Re Ruffalo, 390 U.S. 544 (1968).

FALOW was completely frustrated in his attempts to obtain

the subject Appellate Division material including confidential records, ex-parte communications and ex-parte evidence which passed between the Committee and the Appellate Division (Appendix J). Knowing only of their existence, FALOW was never permitted to examine these documents (Appendices K, N and P). He is merely aware that this evidence was submitted to the Appellate Division and may have been used against him. Cf. Barsky v Board of Regents, 347 U.S. 442 (1954) and more particularly the dissenting opinion at 468-471 (1954). Clearly, he was afforded no opportunity to refute such evidence. FALOW was denied the issuance of subpoenas permitted by Appellate Division Rule 691. This violated fundamental due process. FALOW had no opportunity to show that such unknown evidence was untrue. Green v McElroy, 360 U.S. 474, 495 (1959). Cf. Little v Streater, 452 U.S. 1, 12-14 (1981) where the Court held that the failure of the state to pay for blood tests for an indigent defendant in a paternity suit brought by the state deprived the defendant of due process where such evidence was controlling.

What has transpired is akin to the famous scenario in the play by Franz Kafka, "The Trial." Called before an unnamed court and charged with unspecified crimes, the defendant was required to plead and thereafter to refute the charges. Like the defendant in "The Trial," FALOW was faced with the "Kafkaesque" dilemma of not knowing what evidence was used and thus was unable to meet or refute it. Due process requires that he have the right to contradict by proof every material fact that bears upon the right to his license at issue in the proceedings. Ex-parte communication between prosecutor and adjudicator on matters relevant to the proceedings is impermissible without violating due process. Camero v United States, 375 F.2d 777, 780 (Ct. Cl. 1967). Accord: Sullivan v Dept. of the Navy, 720 F.2d 1266, 1274 (Fed. Cir. 1983). Counsel to the Committee violated this rule. (See appendix J and the affirmation of Mary Ann Yanarella dated January 26,

1993 referring thereto at ¶17.)

In Greene v McElroy, 360 U.S. 474, 496-498 (1959), this Court made it clear that due process is violated where the accusing agency refuses to disclose evidence against the defendant. Such a process deprives the defendant of the opportunity to confront the witnesses against him who provided the evidence, let alone the opportunity to refute the same. It is undisputed that the Committee engaged in ex-parte communications with the Appellate Division; that evidence of alleged wrongdoing by FALOW was submitted to the Appellate Division without notice to him. The Yanarella letter on behalf of the Committee to Kearse, principal law assistant to Appellate Division Presiding Justice Mangano dated May 23, 1991 containing enclosures was sent—only 18 days before the Appellate Division, on June 19, 1991, approved the disciplinary proceeding commencement against FALOW (Appendix L). The order also contained a summary suspension, later revoked on August 19, 1991 (Appendix M). The Appellate Division, to its credit, saw the due process infirmities of the original order.

FALOW sought to obtain evidence of the nature and extent of the Committee's ex-parte communications so that he could establish affirmative defenses set forth in his answer. An attorney is constitutionally entitled to present his defenses. Garden State Bar Association v Middlesex County Ethics Committee, 643 F.2d 119, 124 (3d Cir. 1981), reversed on other grounds, 459 U.S. 423 (1981). Surely, there was at the very least, "ball park" subject matter relevance to these records and materials. Accordingly, they fell within the scope of the order of reference. No manner of spin applied by the Committee or its apologists has served to justify or attenuate the failure of the Appellate Division to require disclosure of these materials. The right to introduce evidence and have findings based thereon is a fundamental element of due process. The whole matter is strange indeed! Surely, due process was trampled by this

procedure! Morrissey v Brewer, 408 U.S. 471, 491 (1972).

Although FALOW was exonerated in a 1979 disciplinary proceeding, the Committee sent this file to the Appellate Division while it had under consideration the motion by the Committee for interim suspension. Cf. Matter of Dondi, 63 N.Y.2d 331, 339 (1984). Such procedure does not appear to be permitted. Such "private file" cannot be the basis for any loss of rights. Matter of Block v Ambach, 73 N.Y.2d 323, 332 (1989). A declaration by this Court that such procedure will not be tolerated is in order. Until then, like Marley's Ghost, it is destined to reappear and haunt the parties and others until it is properly exorcized!

Judiciary Law §90(10), designed to protect the attorney from unwarranted intrusion into confidential information, acts merely as a shield. However, it is a shield for the benefit of the attorney. It is not a shield for the benefit of the Committee to entitle it to withhold relevant and/or material information. Cf. Pasik v State Board of Law Examiners, 102 A.D.2d 395, 398 (1st Dept. 1984). Similarly, Appellate Division Rule 691.4(j) cannot be fairly interpreted to deprive an attorney of access to his own records contained in any files within the possession of the Committee or the Appellate Division. Such material is subject to subpoena in a disciplinary proceeding. Matter of State -- Office of Mental Retardation & Development Disability v Mastracci, 77 A.D.2d 473, 475-476 (4th Dept. 1980). Can it be said on the record that such material is utterly irrelevant? We think not.

Ex parte communication is clearly the "extrajudicial source" contemplated by the Court in United States v Grinnell Corp., 384 U.S. 563, 583 (1966) as necessary for the recusal of a judge relying on same in rendering an opinion. It follows that reliance by the Appellate Division on such material would deprive FALOW of due process. It cannot be said that there was not at least the appearance of unfairness. That would be enough to vitiate the disbarment and require a new trial. FALOW was

entitled to a fair trial in a fair tribunal. In re Murchison, 349 U.S. 133, 136 (1955) free from even the appearance of bias. Peters v Kiff, 407 U.S. 493, 502 (1972).

The New York Court of Appeals has taken the proper position that access to otherwise confidential data relevant or material to the determination of guilt or innocense must be provided to a criminal defendant. People v Gissendanner, 48 N.Y.2d 543, 548 (1979). Nevertheless, that Court has not expressly applied this very basic concept to attorney disciplinary proceedings. A court cannot arbitrarily distinguish the property rights of attorneys from the personal rights of criminal defendants to the detriment of attorneys asserting the same. If those principles of fair play and justice which are almost automatically applied to criminal cases are to be deemed not applicable in disciplinary proceedings, although logically they should, then this Court should take this opportunity, by way of this appeal, to clearly and carefully so state. It should set forth what rights are to be afforded attorneys and how they are to be applied. Cf. People v Rosario, 9 N.Y.2d 286 (1961). Willner v Committee on Character and Fitness, 373 U.S. 96, 102, 105-106 (1963).

The Committee has admitted submitting an application for an order to disclose. Such an order may be granted only upon a showing of good cause [Judiciary Law §90(10)]. Accordingly, evidence, including statements of witnesses, had to have been submitted to the Court in order to obtain the disclosure order. That some of this material could be irrelevant or immaterial to the determination of guilt or innocence is no answer. Denial to FALOW of the right to see the order to disclose and the application for such order unconstitutionally tainted the entire proceeding. It is apparent that there was some form of ex-parte communication between the Committee and its representatives with the Appellate Division and its functionaries. Neither the Order to Disclose nor the application for same are on the record or have been disclosed to FALOW despite application for these

documents. The use of undisclosed information is presumptively unconstitutional. American-Arab Anti-Discrimination Committee v Reno, 70 F.3d 1045 (9th Cir. 1995).

Such procedure is the antithesis of a fair hearing, in a meaningful manner. Armstrong v Manzo, 380 U.S. 545, 552 (1965). Resolution of this issue requires inquiry into whether the Justices of the Appellate Division who rendered the decision and order of disbarment were influenced thereby to the detriment of FALOW. See: Cooke v United States, 267 U.S. 517, 538 (1925) where the Supreme Court disapproved of the reliance by the lower court on material it did not allow the defendant to see. Not surprisingly, there is no clear guidance with respect to disciplinary proceedings. However, as a general premise, ex parte communication with the Tribunal is not permitted. At the very least, unfairness or due process grounds are implicated. Sullivan v Department of the Navy, 720 F.2d 1266, 1274 (Fed. Cir. 1983); United States v Earley, 746 F.2d 412, 415-417 (8th Cir. 1984) cert. denied 472 U.S. 1010 (1985); Brown v United States, 377 F.Supp. 530, 539 (N.D. Texas 1974).

Arguably, the Appellate Division, imposing disbarment rather than some lesser discipline, took into consideration the prior disciplinary proceedings brought against FALOW where FALOW was fully exonerated. Surely, it is a significant issue to take into consideration -- whether, and to what extent, prior disciplinary action against an attorney where he was exonerated would have an effect upon subsequent disciplinary proceedings. If, an attorney, is to be subject to the disciplinary version of the multiple felony offender rule, applicable by statute to criminal proceedings, a clear delineation of just how and under what circumstances this rule will operate should be articulated by the Supreme Court and not left to ad hoc determination on a case by case basis as is apparently the procedure now employed. The travails of FALOW with regard to these issues and the

preservation thereof for review are set forth at some length in the opinion of Judge Connor writing in Thaler v Casella, 960 F. Supp. 691, 694-700 (S.D.N.Y. 1997).

IV. A quasi-criminal proceeding should require the utilization of the "clear and convincing evidence" standard of proof

From the earliest times, due process was to be afforded an attorney charged with disciplinary code violations. Ex parte Secombe, 60 U.S. 9 (1857). Ergo, in the exercise of determining what process was "due," the courts, have recognized that discipline should be invoked upon a lawyer resulting in disbarment only in a plain case, since his professional right and the prosperity of his whole life depends upon the same. Ex parte Burr, 22 U.S. 529 (1824). Full due process is required. Matter of Levy, 37 N.Y.2d 279, 282 (1975).

The Appellate Division, in sustaining certain of the charges as recommended by the subsequent referee, concluded that there was impermissible self-dealing by FALOW at the expense of clients, and to a lesser extent third parties such as mortgagee banks. In the absence of demonstrable loss by the client or third party, there was no wrongdoing, particularly in the absence also of any level of subsequent proof that there was specific intent on the part of FALOW to commit unethical acts to the detriment of the clients or third parties. The standard of proof should fairly allocate the risk of error between litigants and properly indicate the relative importance attached to the ultimate decision. Addington v Texas, 441 U.S. 418, 424-426 (1979). Such proof should rise to the level of clear and convincing in order to support disbarment.

The legal equivalent of the basketball aphorism "no harm, no foul" is most applicable to this unusual situation. This Court should review and determine just what is the standard of proof

to be met. That is, whether the burden is clear and convincing or merely preponderance. "Preponderance" only requires that there be a belief by the trier of fact that the existence of a fact is more probable than its non-existence -- a very low standard. In re Winship, 397 U.S. 358, 371-372 (1970). A finding is "clearly erroneous" only when the reviewing body is left with a firm conviction that a mistake has been committed. United States v United States Gypsum Co., 333 U.S. 364, 395 (1948). A showing of "unreasonableness" requires even greater certainty of error on the part of a reviewing body. Anderson v Liberty Lobby Inc., 477 U.S. 242, 252 (1986). See: Lott, Balancing Burdens of Proof and Relevant Conduct: At what Point Is Due Process Violated? 45 Baylor L. Rev. Fall, 1993.

The standard of proof in a disciplinary proceeding is an element of procedural due process. In Matthews v Eldridge 424 U.S. 319, 335 (1976) the Court articulated three (3) elements, including weighing the risk of an erroneous deprivation of a property right through procedures that are used. A low standard of proof will effectively deprive an attorney of his license where a higher standard would not. In a close case, given the now obvious and rampant prejudice against the legal profession, the higher standard is necessary!

This Court requires clear and convincing evidence before commitment of the mentally ill. Addington v Texas, 441 U.S. 418 (1979). Clear and convincing evidence is also required to terminate parental rights. Santosky v Kramer, 455 U.S. 745 (1982). Clear and convincing evidence that the defendant is a danger to the community is statutorily required to detain without bail, pre-trial, in a federal criminal case after an adversary hearing. United States v Salerno, 481 U.S. 739, 741 (1987). Finally, clear and convincing evidence is required to terminate life-sustaining treatment to an incompetent person in a vegetative state. Cruzan v Director, Missouri Dept. of Health, 497 U.S. 261, 282 (1990). Should not such proof be required

to take away a lawyer's license?

As a general proposition, it appears that only in New York, and in a minority of states (Appendix S), charges of professional misconduct by a disciplinary committee require merely proof thereof rising to the level of fair preponderance of the credible evidence. Matter of Capoccia, 59 N.Y.2d 549 (1983). The great majority of states, and correctly so, require clear and convincing evidence (Appendix S). In re Benjamin, 698 A.2d 434, 437-440 (D.C. App. 1997). As a matter of sound policy, this Court should require clear and convincing evidence in all disciplinary cases in order to afford due process. The issue is of manifest significance to the bench and bar of all jurisdictions.

In effect, we deal with the clearly recognized differentiation in the criminal field, between crimes malum prohibitum and crimes malum in se. Without belaboring the point, fraud is wrong by its very nature. Advertising, may be wrong, merely because the legislature says it is wrong. See: Zauderer v Office of Disciplinary Counsel, 471 U.S. 626 (1985). Surely, different standards of proof should be required under such circumstances. The above is contrasted with the definitions of professional misconduct which include, malpractice, fraud and deceit as well as conduct prejudicial to the administration of justice. [Judiciary Law 90(2)]. It is even more particularly defined in Appellate Division Rule §691 as conduct not in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege of the practice of law. Thus, proof as to specific intent and thought processes should require a higher standard, particularly where a charge involves fraud and deceit, then the proof that would be required for non-fraud violations, not involving any type of mens rea, scienter or fraudulent intent.

In Matter of Padilla, 67 N.Y.2d 440 (1986) the Court of Appeals recognized the power of the Appellate Division to suspend summarily in cases involving perceived and

acknowledged serious misconduct where the proof is admitted or uncontroverted and the public interest is threatened. In the absence of such circumstances, summary suspension is not permitted. Implicit therein is recognition by the Court of Appeals of summary suspension power by the Appellate Division only in those very narrow circumstances. The inference is strong that the summary suspension power may be exercised by the Appellate Division only when it has before it evidence that is clear and convincing - that is, uncontroverted as a matter of law. No such clear and convincing evidence was presented to the referee or the Appellate Division sufficient to sustain the charges against FALOW. Use of the lesser "preponderance" standard deprived him of due process. Indeed, the Appellate Division implicitly understood and agreed. It revoked the summary suspension of FALOW (Appendices L and M).

In sum, there should be a direct relationship between the quantum of proof necessary to sustain a charge and the moral turpitude, venality or criminality of the charge itself. The more serious the charge - the more proof required. Where the charge includes fraudulent or deceitful intent, or other malum in se thought processes, rather than merely evidence of the act itself, regardless of the thought processes which impel the same, then under such circumstances, the higher "clear and convincing" standard, logically as well as legally, should be required. This is particularly apt where, as here, in a disciplinary proceeding impacting a lawyer's license, life, future and reputation, greater certainty is needed. Concrete Pipe and Products of California, Inc. v Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993). The "clear and convincing" standard must be made uniform in disciplinary proceedings involving issues of moral turpitude and venal intent in order to afford due process to attorneys facing disbarment on such charges.

Conclusion

It has been conclusively established that FALOW was deprived of due process by a quasi-criminal disciplinary proceeding resulting in his disbarment, not commenced until 11 months after it was authorized, where the Appellate Division: acted as investigator, prosecutor, adjudicator and disciplinor; utilized recommended findings, including credibility resolution by its appointed subsequent referee who neither heard nor saw any of the 44 witnesses, but relied only upon the transcript taken before the deceased prior appointed referee; refused FALOW's formal requests to see or use files that it maintained on him in connection therewith; utilized testimony against him not taken in his presence and not subject to cross-examination; denied him subpoenas and the opportunity to present constitutional defenses; and finally, that FALOW was deprived of due process by utilization of the preponderance rather than clear and convincing evidence standard of proof. Manifestly, justice requires that this Court take certiorari and reverse.

Dated: White Plains, New York
September 25, 1998

Leon J. Greenspan
Counsel of Record
GREENSPAN & GREENSPAN
Attorneys for Petitioner
34 South Broadway, Suite 605
White Plains, NY 10601-4400
(914)946-2500

LEON J. GREENSPAN
MICHAEL E. GREENSPAN
Of Counsel

APPENDIX

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND
JUDICIAL DEPARTMENT

8328Z
C/hu

____AD2d____

LAWRENCE J. BRACKEN, J.P.
ALBERT M. ROSENBLATT
CORNELIUS J. O'BRIEN
DAVID S. RITTER
JOHN COPERTINO, JJ.

90-08145

In the Matter of William B. Falow, an attorney and counselor-at-law.

OPINION & ORDER

Grievance Committee for the Ninth Judicial District, petitioner;
William B. Falow, respondent.

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. The respondent was admitted to the Bar on December 11, 1961, at a term of the Appellate Division of the Supreme Court in the First Judicial Department. By order on motion of this court, dated April 15, 1993, the issues raised by the petition and answer were referred to the Honorable George J. Balbach, as Special Referee to hear and report. By

subsequent order of this court dated May 6, 1996, the Honorable John A. Monteleone, was appointed to review the record of the proceedings before the late Honorable George J. Balbach, to hold such hearings, if any, as in his discretion were necessary to enable him to make findings on the issues raised by the pleadings, and to report his findings on the issues.

Gary L. Casella, White Plains, N.Y. (Maryann Yanarella of counsel), for petitioner.

Rick, Steiner, & Tannenbaum, P.C., New York, N.Y. (Samuel Tannenbaum of Counsel), for respondent.

PER CURIAM. In this proceeding, the respondent was served with a petition containing 30 detailed charges of professional misconduct. Charges 15, 16, and 20 were withdrawn. Special Referee John A. Monteleone sustained portions of Charges One and Two and sustained, in toto, Charges 4, 5, 6, 8, 9, 10, 11, 14, 19, 26, 27, 28, 29, and 30. The Grievance Committee now moves to confirm all of those findings of the Special Referee which sustained charges of professional misconduct and to disaffirm those portions of the Special Referee's report which failed to sustain charges or portions thereof. The respondent cross-moves to confirm those portions of the Special Referee's report which failed to sustain charges and to disaffirm those portions of the Special Referee's report which sustained whole charges or portions thereof.

Charges 2 through 5 pertain to a parcel of real property at 86 Beekman Avenue in Mount Vernon.

Charges 2 and 3 alleged that the respondent engaged in an impermissible conflict of interest and/or accepted employment where the exercise of his professional judgment on behalf of a client would be or reasonably may have been affected by his own financial, business,

property, or personal interest.

Charge 4 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and/or conduct which adversely reflects on his fitness to practice law by providing a false and misleading answer to a complaint of professional misconduct, by providing false and misleading testimony, under oath, to the legitimate inquiries of the Grievance Committee, and by obstructing an investigation of the Grievance Committee.

Charge 5 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by attempting to suborn the perjury of a potential witness in a disciplinary proceeding.

Charges 7 through 10 pertain to a parcel of real property at 224 Union Avenue in Mt. Vernon.

Charge 7 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and/or conduct prejudicial to the administration of justice.

Charge 8 alleged that the respondent engaged in an impermissible conflict of interest and/or accepted employment where the exercise of professional judgment on behalf of his client would be or reasonably may have been affected by his own financial, business, property or personal interests.

Charge 9 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and/or breach of fiduciary responsibilities and/or commingling.

Charge 10 alleged that the respondent engaged in conduct involving fraud, deceit or misrepresentation and/or conduct which adversely reflects on his fitness to practice law by providing false and misleading testimony, under oath, to the legitimate inquiries of the Grievance Committee and by obstructing the Grievance Committee's

investigation.

Charges 12 through 14 pertain to a parcel of real property at 457 South First Avenue in Mount Vernon.

Charge 12 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and/or conduct prejudicial to the administration of justice with respect to the Westchester County Surrogate's Court.

Charge 13 alleged that the respondent engaged in an impermissible conflict of interest and/or accepted employment where the exercise of his professional judgment on behalf of his client would be or reasonably may have been affected by his own financial, business, property, or personal interest.

Charge 14 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresention and/or conduct which adversely reflects on his fitness to law by providing a false and misleading answer to a complaint of professional misconduct, by providing false and misleading testimony, under oath, to the legitimate inquiries of the Grievance Committee, and by obstructing the Grievance Committee's investigation.

Charges 18 and 19 pertain to a parcel of real property at 405 S. Fourth Avenue in Mount Vernon.

Charge 18 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and/or participated in the creation or preservation of evidence when he knew or it was obvious that the evidence was false.

Charge 19 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and/or conduct which adversely reflects on his fitness to practice law by providing a false and misleading answer to a complaint of professional misconduct, by providing false and misleading testimony, under oath, to the legitimate inquiries of the Grievance

Committee, and by obstructing the Grievance Committee's investigation.

Charges 23 and 25 emanate from a joint venture agreement involving the purchase at foreclosure of a parcel of real property at 3201 Country Club Road in the Bronx.

Charge 23 alleged that the respondent accepted employment where he represented multiple clients with differing interests without full disclosure.

Charge 25 alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and/or conduct prejudicial to the administration of justice.

Charges 26 through 29 pertain to the respondent's interest-bearing account at the National Westminster Bank.

Charge 26 alleged that the respondent failed to account for clients and third parties' funds.

Charge 27 alleged that the respondent engaged in conduct which adversely reflects on his fitness to practice law by failing to maintain a duly-constituted escrow account and by commingling funds.

Charge 28 alleged that the respondent engaged in conduct which adversely reflects on his fitness to practice law by failing to maintain the required books and records for his escrow account pursuant to Code of Professional Responsibility DR 9-102(D) and (1) (22 NYCRR 1200.46[d],[i]).

Charge 29 alleged that the respondent engaged in conduct which adversely reflects on his fitness to practice law by failing to cooperate with the Grievance Committee's investigations and by failing to produce records pursuant to a subpoena so ordered by this court.

Based on the voluminous record and the evidence adduced in the course of this disciplinary proceeding, the motion and cross motion to confirm in part and disaffirm in part are granted to the extent that the following charges are sustained: Charges 2, 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 18,

19, 23, 25, 27, 28 and 29, in toto, and Charge 26, solely with respect to failing to account for clients' and third parties' funds. The remaining charges are not sustained and the motion and cross motion are otherwise denied.

In determining an appropriate measure of discipline to impose, we note that the respondent's misconduct consists of a pattern of self-dealing and of advancing his own financial interests, often to the detriment of clients, third parties, and the legal profession. From the multiplicity of charges involved, it is evident that these were not merely isolated instances of inadvertence. From the evidence adduced, it is apparent that the respondent views the practice of law as a conduit for the furtherance of his own financial interests by way of a multitude of complex real estate actions in which he and others were involved. Stated succinctly, the respondent has repeatedly engaged in conduct involving conflicts of interest and/or accepting employment where the exercise of his professional judgment may have been affected by his own interests, obstructing the Grievance Committee's investigation, dishonesty, fraud, deceit or misrepresentation, and/or conduct prejudicial to the administration of justice, commingling, failing to account for clients' and third parties' funds, and failing to maintain required books and records.

The respondent was issued a Letter of Admonition dated May 2, 1985, for taking a lien on escrow funds in his possession to compensate him for services rendered. The respondent was advised at that time that it is a lawyer's obligation to promptly deliver to the client, as requested, funds in his possession which the client is entitled to receive.

Although a number of clients testified with respect to the respondent's excellent reputation, low fees, and legal prowess, he has engaged in a pervasive pattern of self-dealing and obstruction of the legitimate investigation of the

Grievance Committee which warrants his disbarment

BRACKEN, J.P., ROSENBLATT, O'BRIEN, RITTER and COPERTINO, JJ., concur.

ORDERED that the petitioner's motion and the respondent's cross motion to confirm in part and disaffirm in part the report of the Special Referee are granted to the extent that Charges 2, 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 18, 19, 23, 25, 27, 28, and 29 are sustained in toto and Charge 26 is sustained solely with to failing to account for clients' and third parties' funds, and the motion and cross motion are otherwise denied; and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, the respondent, William Falow, is disbarred and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that William B. Falow shall promptly comply with this court's rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, William B. Falow is commanded to desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law.

BRACKEN, J.P, ROSENBLATT, O'BRIEN, RITTER and COPERTINO, JJ., CONCUR.

Enter:
June 23, 1997

MARTIN H. BROWNSTEIN
Clerk

Appendix B

State of New York
Court of Appeals

At a session of the Court, held at Court
of Appeals Hall in the City of Albany
On the twenty-third day of October 1997

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

Mo. No. 1279 SSD 86
In the Matter of William B. Falow,
an attorney and counselor-at-law.
Grievance Committee for the Ninth,
Judicial District,

Respondent,

William B. Falow,

Appellant.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York

DECISION October 23, 1997

Mo. No. 1279 SSD 86
In the Matter of William B. Falow,
an attorney and counselor-at-law.
Grievance Committee for the
Ninth Judicial District,

Respondent,

William B. Falow,

Appellant.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Appendix C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

LAWRENCE J. BRACKEN, J.P.
ALBERT M. ROSENBLATT
CORNELIUS J. O'BRIEN
DAVID S. RITTER
JOHN COPERTINO, JJ.

90-08145

DECISION & ORDER ON MOTION

In the Matter of William B. Falow,
a disbarred attorney.

Grievance Committee for the Ninth
Judicial District, petitioner;
William B. Falow, respondent.

Motion by the respondent for an order granting leave to appeal to the Court of Appeals from an opinion and order of this court, dated June 23, 1997, which disbarred him. The respondent was admitted to the practice of law by the Appellate Division, First Judicial Department on December 11, 1961.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

BRACKEN, J.P., ROSENBLATT, O'BRIEN, RITTER and COPERTINO, JJ., concur.

Martin H. Brownstein
Clerk

April 21, 1998

Appendix D

State of New York
Court of Appeals

At a session of the Court, held at
Court of Appeals Hall
in the City of Albany
on the ninth day of July 1998

Present, HON.JUDITH S. KAYE, Chief Judge, presiding.

---

2 - 24 Mo. No. 731

In the Matter of William B.
Falow, a disbarred attorney.

Grievance Committee for the Ninth
Judicial District,

Respondent;

William B. Falow,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION July 9, 1998

2-24 Mo. No. 731

In the matter of William B.
Falow, a disbarred attorney.

Grievance Committee for the Ninth
Judicial District,

Respondent;

William B. Falow,

Appellant.

Motion for leave to appeal denied.

Appendix E

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Appendix F

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix G

JUDICIARY LAW
ARTICLE 4. APPELLATE DIVISION

NY CLS Jud § 90 (1998)

§ 90. Admission to and removal from practice by appellate division; character committees

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law and has satisfied the requirements of section 3-503 of the general obligations law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court, if it shall be satisfied that such person is currently admitted to the bar in such other jurisdiction or jurisdictions, that at least one such jurisdiction in which he is so admitted would similarly admit an attorney or counsellor-at-law admitted to practice in New York state to its bar without examination

and that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law and has satisfied the requirements of section 3-503 of the general obligations law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys. Such application, which shall conform to the requirements of section 3-503 of the general obligations law, shall be submitted to the appellate division of the supreme court in the department specified in the rules of the court of appeals.

c. The members of the committee appointed by the appellate division in each department to investigate the character and fitness of applicants for admission to the bar, shall be entitled to their necessary traveling, hotel and other expenses, incurred in the performance of their duties, payable by the state out of moneys appropriated therefor, upon certificate of the presiding justice of the appellate division by which such committee is appointed.

d. The committee on character and fitness appointed by the of the supreme court in the first judicial department and the character and fitness appointed by the appellate division of the second judicial department, may each, with the written justices of each of such appellate divisions or a majority of acting for their respective appellate divisions, from time to remove a secretary, stenographers and assistants, and procure for each committee, properly furnished and equipped and all books, stationery, blanks, postal cards, express and postage stamps as shall be required for the proper performance of the duties of each such committee.

e. The salaries of such secretary, stenographers and assistants shall be fixed for each department by the justices of the appellate division in each department or a majority of

them in each department.

f. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the first judicial department, shall, in the said first judiciai department, be paid by the comptroller of the city of New York.

g. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the second judicial department shall be certified by the presiding justice of such department to the state comptroller who shall audit the same. The state department of taxation and finance shall pay such salaries and expenses and shall apportion the same among the counties comprising the second judicial department. Such counties shall reimburse the state for such compensation. The time and method of such apportionment and the time and method of such reimbursement shall be as specified in section seventy-four* of this chapter.

- - - - - - - - - - - - - -FOOTNOTES- - - - - - - - - - - - - - - - - - -

* Repealed, L 1975, ch 152.

- - - - - - - - - - - - - -END FOOTNOTES- - - - - - - - - - - -

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any,form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

2-a. a. The provisions of this subdivision shall apply in all cases of an attorney licensed, registered or admitted to practice in this state who has failed after receiving appropriate notice, to comply with a summons, subpoena or warrant relating to a paternity or child support proceeding involving him or her personally, or who is in arrears in payment of child support or combined child and spousal support which matter shall be referred to the

appropriate appellate division by a court pursuant to the requirements of section two hundred forty-four-c of the domestic relations law or pursuant to section four hundred fifty-eight-b or five hundred forty-eight-b of the family court act.

b. Upon receipt of an order from the court based on arrears in payment of child support or combined child and spousal support pursuant to one of the foregoing provisions of law, the appropriate appellate division within thirty days of receipt of such order, if it finds such person to be so licensed, registered or admitted, shall provide notice to such attorney of, and initiate, a hearing which shall be held by it at least twenty days and no more than thirty days after the sending of such notice to the attorney. The hearing shall be held solely for the purpose of determining whether there exists as of the date of the hearing proof that full payment of all arrears of support established by the order of the court to be due from the licensed, registered or admitted attorney have been paid. Proof of such payment shall be a [fig 1] certified check showing full payment of established arrears or a notice issued by the court or the support collection unit [fig 2] where the order is payable to the support collection unit designated by the appropriate social services district. Such notice shall state that full payment of all arrears of support established by the order of the court to be due have been paid. The licensed attorney shall be given full opportunity to present such proof of payment at the hearing in person or by counsel. The only issue to be determined as a result of the hearing is whether the arrears have been paid. No evidence with respect to the appropriateness of the court order or ability of the respondent party in arrears to comply with such order shall be received or considered by the disciplinary committee.

c. (Added, L 1997) Upon receipt of an order from the court based on failure to comply with a summons, subpoena, or warrant relating to a paternity or child support

proceeding, the appropriate appellate division within thirty days of receipt of such order, if it finds such person to be so licensed, registered §or admitted, shall provide notice to such attorney that his or her license shall be suspended within sixty days of such notice to the attorney unless the conditions in paragraph e of this section are met.

d. Notwithstanding any inconsistent provision of this section or of any other provision of law to the contrary, the license to practice law in this state of an attorney admitted to practice shall be suspended by the appellate division if, at the hearing provided for by paragraph h of this subdivision, the licensed attorney fails to present proof of payments as required by such subdivision. Such suspension shall not be lifted unless the original court or the support collection unit, where the court order is payable to the support collection unit designated by the appropriate social services district, issues notice to the appellate division that full payment of all arrears of support established by the order of the original court to be due have been paid.

e. (Added, L 1997) Notwithstanding any inconsistent provision of this section or of any other provision of law to the contrary, the license of an attorney admitted to practice law in this state shall be suspended by the appellate division, in accordance with paragraph c of this subdivision unless the court terminates its order to commence suspension proceedings. Such suspension shall not be lifted unless the court issues an order to the appellate division terminating its order to commence suspension proceedings.

f. The appellate division shall inform the original court of all actions taken hereunder.

g. This subdivision two-a applies to paternity and child support proceedings commenced under, and support obligations paid pursuant to any order of child support or child and spousal support issued under provisions of (fig 1]

section two hundred thirty-six or two hundred forty of the domestic relations law, or article four, five, [fig 2] five-A or five-B of the family court act.

h. Notwithstanding any inconsistent provision of this section or of any other provision of law to the contrary, the provisions of this subdivision two-a shall apply to the exclusion of any other requirements of this section and to the exclusion of any other requirement of law to the contrary.

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

4. a. Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

b. Whenever any attorney and counsellor-at-law shall be convicted of a felony as defined in paragraph e of this subdivision, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

c. Whenever an attorney shall be convicted of a crime in a court of record of the United States or of any state, territory or district, including this state, whether by a plea of guilty or nolo contendere or from a verdict after trial or otherwise, the attorney shall file, within thirty days thereafter, with the appellate division of the supreme court, the record of such conviction.

The failure of the attorney to so file shall be deemed professional misconduct provided, however, that the appellate division may upon application of the attorney, grant an extension upon good cause shown.

d. For purposes of this subdivision, the term serious crime shall mean any criminal offense denominated a felony under the laws of any state, district or territory or of the United States which does not constitute a felony under the laws of this state, and any other crime a necessary element of which, as determined by statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

e. For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein which if committed within this state, would constitute a felony in this state.

f. Any attorney and counsellor-at-law convicted of a serious crime, as defined in paragraph d of this subdivision, whether by plea of guilty or nolo contenders or from a verdict after trial or otherwise, shall be suspended upon the receipt by the appellate division of the supreme court of the record of such conviction until a final order is made pursuant to paragraph g of this subdivision.

Upon good cause shown the appellate division of the supreme court may, upon application of the attorney or on its own motion, set aside such suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public and the interest of justice.

g. Upon a judgment of conviction against an attorney becoming final the appellate division of the supreme court shall order the attorney to show cause why a final order of suspension, censure or removal from office should not he made.

h. If the attorney requests a hearing, the appellate division of the supreme court shall refer the proceeding to a referee, justice or judge appointed by the appellate division for hearing, report and recommendation.

After said hearing, the appellate division may impose such discipline as it deems proper under the facts and circumstances.

5. a. If such removal or debarment was based upon conviction for a serious crime or upon a felony conviction as defined in subdivision four of this section, and such felony conviction was subsequently reversed or pardoned by the president of the United States, or governor of this or another state of the United States, the appellate division shall have power to vacate or modify such order or debarment, provided, however, that if such attorney or counsellor-at-law has been removed from practice in another jurisdiction, a pardon in said jurisdiction shall not be a basis for application for re-admission in this jurisdiction unless he shall have been readmitted in the jurisdiction where pardoned.

b. If such removal or debarment was based upon conviction for a felony as defined in subdivision four of this section, the appellate division shall have power to vacate or modify such order or debarment after a period of seven years provided that such person has not been convicted of a crime during such seven-year period.

c. An attorney and counsellor-at-law who has been convicted of a felony without the state and whose name has been struck from the roll of attorneys prior to July thirteenth, nineteen hundred seventy-nine by virtue of the provisions of subdivision four of this section may, if he alleges that such felony committed without the state would not constitute a felony if committed within the state, petition the appellate division to vacate or modify such debarment. If the appellate division finds that the felony of which the attorney and counsellor-at-law has been

convicted without the state would not constitute a felony if committed within the state, it shall grant a hearing and may retroactively vacate or modify such debarment and impose such discipline as it deems just and proper under the facts and circumstances.

The attorney and counsellor-at-law shall petition for reinstatement by filing in the appellate division a copy of the order of removal together with a request for a hearing pursuant to the provisions of this paragraph. Upon such application, the order of removal shall be deemed an order of suspension for the purposes of a proceeding pursuant to this paragraph.

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice such attorney and counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order

directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid out of funds appropriated to the office of court administration for that purpose.

6-a. a. where the appellate division of supreme court orders the censure, suspension from practice or removal from office of an attorney or counsellor-at-law following disciplinary proceedings at which it found, based upon a preponderance of the legally admissible evidence, that such attorney or counsellor-at-law wilfully misappropriated or misapplied money or property in the practice of law, its order may require him or her to make monetary restitution in accordance with this subdivision. Its order also may require that he or she reimburse the (fig 1] lawyers, fund for client protection of the state of New York for awards made to the person whose money or property was wilfully misappropriated or misapplied.

b. Monetary restitution, as authorized hereunder, shall be made to the person whose money or property was wilfully misappropriated or misapplied and shall be for the amount or value of such money or property, as found in the disciplinary proceedings. In the event that such person dies prior to completion of such restitution, any amount remaining to be paid shall be paid to the estate of the deceased.

c. Any payment made as restitution pursuant to this subdivision shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment; nor shall any order of the appellate division made hereunder deprive a criminal court of any authority pursuant to article sixty of the penal law.

d. An order issued pursuant to this subdivision may be entered as a civil judgment. Such judgment shall be

enforceable as a money judgment in any court of competent jurisdiction by any person to whom payments are due thereunder, or by the [fig 1] lawyers, fund for client protection where it has been subrogated to the rights of such person.

e. Where an attorney or counsellor-at-law is permitted to resign from office, the appellate division may, if appropriate, issue an order as provided herein requiring him or her to make payments specified by this subdivision.

f. Notwithstanding any other provision of this subdivision, no order may be issued hereunder unless the person required to make payments under such order first is given an opportunity to be heard in opposition thereto.

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when SO designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to he paid to such attorney and counsellor-at-law for the services rendered which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.

9. No objection shall be taken to the appointment of any member of the bar to §act as referee or judge in a disciplinary proceeding under this section on the ground that he is a member of a bar association or other corporation or association which is the petitioner therein.

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and he deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

HISTORY: Formerly § 88, add, L 1909, ch 35, amd, L 1941, ch 290, L 1943, ch 710, renumbered § 90 and amd, L 1945, ch 649, eff Apr 9, 1945, with which is merged 99 476-478. Former § 90, add, L 1909, ch 35, repealed, L 1938, ch 494. Section heading, amd, L 1949, ch 701, eff Apr 20, 1949. Sub1, amd, L 1949, ch 701, eff Apr 20,

1949. Sub 1, par c, amd, L 1962, ch 310, § 205, eff Sept 1, 1963. Sub 1, par d, amd, L 1962, ch 310, § 206, eff Sept 1, 1963. See 1962 note under § 2-a. Sub 1, par g, amd, L 1958, ch 960, eff Oct 1, 1959. Sub 4, add, L 1979, ch 674, § 1, eff July 13, 1979. Former sub 4, repealed, L 1979, ch 674, § 1, eff July 13, 1979. Sub 5, add, L 1979, ch 674, § 2, eff July 13, 1979. Sub 5, par c, add, L 1982, ch 777, § 1, eff July 27, 1982. Former sub 5, amd, L 1969, ch 743, eff Sept 1, 1969, L 1978, ch 782, § 1, repealed, L 1979, ch 674, § 2, eff July 13, 1979. Sub 6, amd, L 1961, ch 733, eff Apr 22, 1961, L 1976, ch 325, eft June 8, 1976, Sub 7,amd, L 1961, ch 733, eff Apr 22, 1961. Sub 10, formerly § 88, sub 8, add, L 1945, ch 675, renumbered, L 1946, ch 241. Sub 1, par a, amd, L 1995, ch 81, § 229, eff July 1, 1995 (see 1995 note below). Sub 1, par b, amd, L 1985, ch 226, § 1, eff June 18, 1985, L 1988, ch 307, § 1, eff Aug 24, 1988, L 1995, ch 81, § 229, eff July 1, 1995 (see 1995 note below). Sub 2-a, add, L 1995, ch 81, § 222, eff July 1, 1995 (see 1995 note below). Sub 2-a, par a, amd, L 1997, ch 398, § 127, eff Jan 1, 1998. Sub 2-a, par b, amd, L 1997, ch 398, § 127, eff Jan 1, 1998. The 1997 act deleted at fig 1 "certified" and at fig 2 a comma Sub 2-a, par c, add, L 1997, ch 398, § 127, eff Jan 1, 1998. Former sub 2-a, par c, redesignated sub 2-a, par d, L 1997, ch 398, § 127, eff Jan 1, 1998. § Sub 2-a, par d, formerly sub 2-a, par c, so designated sub 2-a, par d, L 1997, ch 398, § 127, eff Jan 1, 1998. Former sub 2-a, par d, redesignated sub 2, par f, L 1997, ch 398, § 127, eff Jan 1, 1998. Sub 2-a, par e, add, L 1997, ch 398, § 127, eff Jan 1, 1998. Former sub 2-a, par e, redesignated sub 2-a, par g, L 1997, ch 398, § 127, eff Jan 1, 1998. Sub 2-a, par f, formerly sub 2-a, par d, so designated sub 2-a, par f, L 1997, ch 398, § 127, eff Jan 1, 1998. Former sub 2-a, par f, redesignated sub 2-a, par h, L 1997, ch 398, § 127,g, formerly sub 2-a, par e, so designated sub 2-a, par

g and 398, § 127, eff Jan 1, 1998. deleted at fig 1 "article three-A or" and at fig 2 "Or" h, formerly sub 2-a, par f, so designated sub 2-a, par h, L 127, eff Jan 1, 1998. Sub 6-a, add, L 1989, ch 86, § 1, eff May 11, 1989. Sub 6-a, par a, amd, L 1990, ch 103, § 2, eff April 27, 1990. The 1990 act deleted at fig 1 "clients' security fund" Sub 6-a, par d, amd, L 1990, ch 103, § 2, eff April 27, 1990. The 1990 act deleted at fig 1 "clients' security fund"

Appendix H

§ 21. Judge other than of court of appeals or appellate division not to decide question argued during his absence

A judge other than a judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge.

L.1909, c. 35; formerly § 22, renumbered 21, L-1945, c. 649, § 10.

Appendix I

PART 691. CONDUCT OF ATTORNEYS

§ 691.1 Application

(a) This Part shall apply to all attorneys who are admitted to practice, reside in, commit acts in or who have offices in the Second Judicial Department, or who are admitted to practice by a court of another jurisdiction and who regularly practice within this department as counsel for governmental agencies or as house counsel to corporations or other entities, or otherwise. In addition, any attorney from another state, territory, district or foreign country admitted pro haec vice to participate in the trial or argument of a particular cause in any court in the Second Judicial Department, or who in any way participates in an action or proceeding therein, shall be subject to this Part

(b) The imposition of discipline pursuant to this Part shall not preclude the imposition of any further or additional sanctions prescribed or authorized by law, and nothing contained in this Part shall be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit bar associations from censuring, suspending or expelling their members from membership in the association or from admonishing attorneys in minor matters; provided, however, that such action by a bar association shall be reported to the appropriate committee appointed pursuant to section 691.4 (a) of this Part, and provided further, that such action by a bar association shall not be a bar to the taking of other and different disciplinary action by this court or by a committee appointed pursuant to section 691.4(a) of this Part.

§ 691.2 Professional Misconduct Defined

Any attorney who fails to conduct himself, either professionally or personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law, and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or any disciplinary rule of the Code of Professional Responsibility adopted jointly by the Appellate Divisions of the supreme Court, effective September 1, 1990, or any canon of the Canons of Professional Ethics adopted by the new York State Bar Association, or any other rule or announced standard of this court governing the conduct of attorneys, shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law.

Cross References

Judiciary Law, see McKinney's Book 29.

Code of Professional Responsibility, see Appendix to McKinney's Judiciary Law Book, Book 29.

§ 691.3 Discipline of Attorneys for Professional Misconduct in Foreign Jurisdiction

(a) Any attorney to whom this Part shall apply pursuant to section 691.1 of this Part, who has been disciplined in another State, territory or district, may be disciplined by this court because of the conduct which gave rise to the discipline imposed in such other State, territory or district.

(b) Upon receipt from the foreign jurisdiction of a

ed or exemplified copy of the order imposing such discipline and of the record of the proceedings upon which such order was based, this court, directly, or by a committee appointed pursuant to section 691.4(a) of this Part, shall give written notice to such attorney pursuant to subdivision (6) of section 90 of the Judiciary Law, according him the opportunity wi@ twenty days of the giving of such notice, to file A verified statement setting forth any defense to a discipline enumerated under subdivision (e) of this affirmation, and a written demand for a hearing at which consideration all be given to any and all defenses enumerated in said subdivision (e) of this section. Such notice shall further advise the attorney that, in default of such filing by him, this court will impose Such discipline or take such disciplinary action as it deems appropriate.

(c) This court in default of the attorney's filing a verified statement and demand as provided for subdivision (b) of this section, may discipline such attorney unless an examination of the entire record before this court, including the record of the foreign jurisdiction and such other evidence as this court in its discretion may receive, discloses (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such any of proof establishing the misconduct as to give rise to the clear conviction that this court could tent with its duties, accept as final finding of the court in the foreign jurisdiction as to the attorney's misconduct; or (3) that the imposition of discipline by this court would be unjust.

(d) Opportunity for Hearing. Where an attorney shall have duly filed both verified statement setting forth any defense (as enumerated in subdivision (c) of this section) to the imposition of discipline by this court and his written demand for a hearing with respect to such defense, no discipline, by way of suspension or otherwise, shall be

imposed without affording the attorney an opportunity to have a hearing.

(e) Any attorney to whom this Part shall apply who has been disciplined in a foreign jurisdiction shall promptly advise this court of such discipline.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 691.4 Appointment of Grievance Committees; Commencement of Investigation of Attorney Misconduct; Complaints; Procedure

(a) This court shall appoint three grievance committees for the Second Judicial Department. One of these grievance committees shall be charged with the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the second and eleventh judicial districts at the done of their admission to practice by the Appellate Division; another shall have the duty and power to investigate and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the ninth judicial district at the time of their admission to practice by the Appellate Division; and the third shall have the duty and power to investigated and prosecute matters arising in or concerning attorneys practicing, or currently residing or having resided in the tenth judicial district at the time of their admission to practice by the Appellate Division. These committees shall also have the power and duty to investigate and prosecute matters concerning attorneys to whom this Part applies pursuant to section 691.1 of this Part.

(b)(1) Each grievance committee shall consist of 19 members and a chairman, all of whom shall be appointed by

this court and 16 of whom shall be attorneys. The chairman shall have the power to appoint an acting chairman from among the members of the grievance committee. Appointments may be made from lists of prospective members submitted by the following county bar associations within the second judicial department: Brooklyn Bar Association, Dutchess County Bar Association, Bar Association of Nassau County, New York, Inc., Orange County Bar Association, Putnam County Bar Association, Queens County Bar Association, Richmond County Bar Association, Rockland County Bar Association, Inc., Suffolk County Bar Association and Westchester County Bar Association. This court shall, in consultation with the committees, appoint a chief counsel to each such grievance committee and such assistant counsel and supporting staff as it deems necessary.

(2) Five persons shall be appointed to each such committee for a term of one year, five persons for a term of two years, five persons for a term of three years and five persons for a term of four years. Thereafter, yearly appointments of five persons shall be made to each such committee for a term of four years. No person who has served two consecutive terms shall be eligible for reappointment until the passage of one year from the expiration of his second such term. The person appointed chairman shall serve as chairman for a term of two years and shall be eligible for reappointment as chairman for not more than one additional term of two years.

(3) The members of the joint bar association grievance committees as volunteers are expressly autho rized to participate in a state-sponsored volunteer program within the meaning of subdivision 1 of section 17 of the Public Officers Law.

(c) Investigation of professional misconduct may be commenced upon receipt of a specific complaint by this court or by any such committee, or such investigation may

be commenced sua sponte by this court or such a committee. Complaints must be in writing and signed by the complainant but need not be verified. Complainants shall be notified by the committee of actions taken by it with respect thereto.

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

(f) Except as otherwise provided for in paragraph (5)of subdivision (e) of this section, if, after preliminary

investigation, the committee shall deem a matter of sufficient importance, written charges predicated thereon, plainly stating the matter or matters charged together with a notice of not less than 20 days, shall be served upon the person concerned, either personally, by certified mail, or in such other manner as the committee may direct. The person so served shall be as a written answer at the time and place designated in the notice and the committee or a subcommittee shah proceed to hold a hearing of the case. The person concerned (hereinafter referred to as the respondent) may be represented and assisted by counsel. The committee or subcommittee shall decide all questions of evidence. Stenographic minutes of the hearing shall be kept.

(g) Whenever in the course of a hearing evidence is presented upon which another charge or charges against the respondent might be made, it shall not be necessary for the committee to prepare and serve an additional charge or charges on the respondent, but the committee or the subcommittee may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if the same had been made and served at the time of the service of the original charge or charges.

(h) If the hearing was held before a subcommittee, it shall make findings of fact and report those findings to the committee. Upon the completion of a hearing, the committee shall promptly meet and either dismiss or sustain the charges and, as to any charges sustained, shall either issue a letter of caution, admonish the respondent, or recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court. A letter of caution may also be issued where the charges have been dismissed. The approval of a recommendation of the filing of disciplinary charges in this court shall be by a majority vote of the full committee.

(i) In the event that a minority of the committee disagrees with a final determination, such minority report shall be filed with this court along with any majority report and the written report of the subcommittee. Upon such filing, the committee shall await the determination of this court before otherwise disposing of the matter.

(j) Unless otherwise provided for by this court, all proceedings conducted by a grievance committee shall be sealed and be deemed private and confidential

(k) Disciplinary proceedings shall be granted a preference by this court.

(l)(1) An attorney who is the subject of an investigation, or of charges by a grievance committee of professional misconduct, or who is the subject of a disciplinary proceeding pending in this court against whom a petition has been filed pursuant to this section, or upon whom a notice has been served pursuant to section 691.3(b) of this Part, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:

(i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or the attorney's failure to submit a written answer to a complaint of professional misconduct within 10 days of receipt of a demand for such an answer by the grievance committee, served either personally or by certified mail upon the attorney or the attorney's failure to comply with any of the lawful demand of this court or the grievance committee made in connection with any investigation, hearing, or disciplinary proceeding; or

(ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct; or

(iii) other uncontroverted evidence of professional misconduct.

(2) The suspension shall be made upon the application of the grievance committee to this court, after notice of such application has been given to the attorney pursuant to subdivision 6 of section 90 of the Judiciary Law. The court shall briefly state its reasons for its order of suspension which shall be effective immediately and until such time as the disciplinary matters before the committee have been concluded. and until further order of this court.

Cross References

Judiciary Law. see McKinney's Book 29.
Public Officers Law, see McKinney's Book 46.

§ 691.5 Investigation of Professional Misconduct on the Part of an Attorney; Subpoenas and Examination of Witnesses Under Oath

(a) Upon application by the chairman or acting chairman of any such committee, or upon application by counsel to such committee, disclosing that such committee is conducting an investigation of professional misconduct on the part of any attorney, or upon application by an attorney under such investigation, the clerk of this court may issue subpoenas, in the name of the presiding justice, for the attendance of witnesses and the production of books and papers before such committee or such counsel or any subcommittee thereof designated in such application, at a time and place therein specified.

(b) Any such committee or a subcommittee thereof is empowered to take and cause to be transcribed the evidence of witnesses who may be sworn by any person authorized by law to administer oaths.

§ 691.6 Reprimand; Admonition; Letter of Caution; Confidentiality

(a) The chairman or acting chairman of any such committee may, after investigation and upon a majority vote of the full committee, issue a reprimand or an admonition or a letter of caution in those cases in which professional misconduct, not warranting proceedings before this court, is found. A reprimand is discipline imposed after a hearing. An admonition is discipline imposed without a hearing. A letter of caution may issue when it is believed that the attorney acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment. In cases in which an admonition or a letter of caution is issued, the attorney to whom such admonition or letter of caution is directed may, within 30 days after the issuance of the admonition or letter of caution, request a hearing before the committee or a subcommittee thereof, and after such hearing, the committee shall take such steps as it deems advisable. In cases in which a reprimand is issued, the attorney to whom such reprimand is issued, may within 30 days of the issuance of the reprimand, petition this court to vacate the reprimand. Upon such petition, this court may consider the entire record and may vacate the reprimand or impose such other discipline as the record may warrant.

(b) A copy of any reprimand or admonition or letter of caution given pursuant to this section should filed with this court.

(c) A confidential record of the proceedings resulting in such reprimand or admonition or letter of caution shall be permanently maintained by such committee (except that the complainant shall be notified of any reprimand or admonition or letter of caution which has become final and is not subject to further review) and may be considered in determining the extent of discipline to be imposed in the

event other charges of misconduct are brought against the attorney subsequently.

(d) The provisions for confidentiality contained in this or any other section of this Part are not intended to proscribe the free interchange of information among the committees.

§ 691.7 Attorneys Convicted of Serious Crimes; Record of Conviction Conclusive Evidence

(a) Upon the filing with this court of a certificate that an attorney has been convicted of a serious crime as hereinafter defined in a court of record of any State, territory or district, including this State, this court shall cause formal charges to be made and served upon the respondent and shall enter an order immediately referring the matter to a referee, justice or judge appointed by this court to conduct forthwith disciplinary proceedings, whether the conviction resulted from a plea of guilty or nolo contenders or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(b) The term "serious crime" shall include any felony, not resulting in automatic disbarment under the provisions of subdivision (4) of section 90 of the Judiciary Law, and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, criminal contempt of court. false swearing, misrepresentation. fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, an attempt or a conspiracy or solicitation of another to commit a serious crime" or a crime involving moral turpitude.

(c) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him

based on the conviction, and the attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

(d) Upon the filing with the court of a certificate that an attorney has been convicted of a crime not constituting a serious crime as hereinbefore defined in a court of record in any State, territory or district, including this State, this court shall either refer the matter to a committee appointed pursuant to section 691.4(a) of this Part for whatever action may be appropriate. or cause formal charges to be made and served upon the respondent and enter an order immediately referring the matter to a referee, justice or judge appointed by this court to conduct forthwith disciplinary proceedings, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial or otherwise, and regardless of the pendency of an appeal.

(e) The clerk of any court within the judicial department in which an attorney admitted to practice in this State is convicted of a crime shall within five days of said conviction forward a certificate thereof to the clerk of this court and to the clerk of the Appellate Division of the Supreme Court in the judicial department in which said person was admitted to practice.

(f) Any such committee, upon receiving information that an attorney to whom these rules shall apply pursuant to section 691.1 of this Part, has been convicted of a crime in a court of record of any State, territory or district, shall determine whether the clerk of the court where the conviction occurred has forwarded a certificate of the conviction to this court If the certificate has not been forwarded by the clerk, such committee shall obtain a certificate of the conviction and forward it to this court.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 691.8 Effect of Restitution on Disciplinary Proceedings

Restitution made by an attorney or on his behalf to a client for funds converted, or t@o reimburse him for losses suffered as a result of the attorney's wrongdoing, shall not be a bar to the commencement or continuance of disciplinary proceedings.

§ 691.9 Resignation of Attorneys Under Investigation

(a) An attorney who is the subject of an investigation into allegations of misconduct may tender his resignation by submitting to the appropriate committee appointed pursuant to section 691.4(a) of this Part an affidavit stating that he intends to resign and that:

(1) his resignation is freely and voluntarily rendered; he is not being subjected to coercion or duress; and he is fully aware of the implications of submitting his resignation;

(2) he is aware that there is pending an investigation into allegations that he has been guilty of misconduct, the nature of which shall be specifically set forth;
and

(3) he acknowledges that if charges were predicated upon the misconduct under investigation, he could not successfully defend himself on the meets against such charges.

(b) Upon receipt of the required affidavit, such committee shall file it with this court, which may enter an order either disbarring him or striking his name from the roll of attorneys.

§ 691.10 Conduct of Disbarred, Suspended or Resigned Attorneys; Abandonment of Practice by Attorney

(a) Compliance With Judiciary Law. Disbarred, suspended or resigned attorneys at law shall comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary Law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.

(b) Compensation. A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the bar, A disbarred, suspended or resigned attorney may be compensated on a quantum meruit basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client Such applications shall be made at special term in the court wherein the action is pending or at special term in the Supreme Court in the county wherein the moving attorney maintains his office if an action has not been commenced. In no event shall the combined legal fees exceed the amount the client would have been required to pay had no substitution of attorneys been required.

(c) Notice to Clients Not Involved in Litigation.

A disbarred, suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigated or administrative matters or

proceedings pending in any court or agency, of his disbarment, suspension or resignation and his consequent inability to act as an attorney after the effective date of his disbarment, suspension or resignation and shall advise said clients to seek legal advice elsewhere.

(d) **Notice to Clients Involved in Litigation.**

(1) A disbarred, suspended or resigned attorney shall promptly notify, by registered or certified mail, return receipt requested, each of his clients who is involved in litigated matters or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding, of his disbarment, suspension or resignation and consequent inability to act as an attorney after the effective date of his disbarment, suspension or resignation. The notice to be given to the client shall advise of the prompt substitution of another attorney or attorneys in his place.

(2) In the event the client does not obtain substitute counsel before the effective date of the disbarment, suspension or resignation, it shall be the responsibility of the disbarred, suspended or resigned attorney to move pro se in the court in which the action is pending, or before the body in which an administrative proceeding is pending, for leave to withdraw from the action or proceeding.

(3) The notice given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred, suspended or resigned attorney. In addition, notice shall be given in like manner to the Office of Court Administration of the State of New York in each case in which a retainer statement has been filed.

(e) **Conduct After Entry of Order.** The disbarred, suspended or resigned attorney, after entry of the disbarment or suspension order or after entry of the order accepting the resignation, shall not accept any new retainer or engage in any new case or legal matter of any nature as attorney for another. However, during the period between

the entry date of the order and its effective date he may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(f) Filing Proof of Compliance and Attorney's Address. Within 10 days after the effective date of the disbarment or suspension order or the order accepting the resignation, the disbarred, suspended or resigned attorney shall be with the clerk of the Appellate Division for the Second Judicial Department an affidavit showing:

(1) that he has fully complied with the provisions of the order and with these rules; and

(2) that he has served a copy of such affidavit upon the petitioner or moving party.

Such affidavit shall also set forth the residence or other address of the disbarred, suspended or resigned attorney where communications may be directed to him.

(g) Appointment of Attorney to Protect Clients' Interests and Interests of Disbarred, Suspended or Resigned Attorney. Whenever it shall be brought to the courts attention that a disbarred, suspended or resigned attorney shall have failed or may fail to comply with the provisions of subdivisions (c), (d) or (f) of as section, this court, upon such notice to such attorney as this court may direct, may appoint an attorney or attorneys to inventory the files of the disbarred, suspended or resigned attorney and to take such action as seems indicated to protect the interests of his clients and for the protection of the interests of the disbarred, suspended or resigned attorney.

(h) Disclosure of Information. Any attorney so appointed by this court shall not be permitted to disclose any information contained in any file so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of a court which appointed the attorney to make such inventory.

(i) Fixation of Compensation. This court may fix the compensation to be paid to any attorney appointed by it

under this section. The compensation may be directed by this court to be paid as an incident to the costs of the proceeding in which the charges are incurred and shall be charged in accordance with law.

(j) Required Records. A disbarred, suspended or resigned attorney shall keep and maintain records of the various steps taken by him under this Part so that, upon any subsequent proceeding instituted by or against him, proof of compliance with this Part and with the disbarment or suspension order or with the order accepting the resignation will be available.

(k) Abandonment of Practice by Attorney. When, in the opinion of this court, an attorney has abandoned his practice, this court, upon such notice to such attorney as it may direct, may appoint the chief counsel of the appropriate joint bar association grievance committee, or an individual attorney, to take custody and inventory the files of such attorney and to take such action as seems indicated to protect the interests of his clients.

Cross References

Judiciary Law, see McKinney's Book 29.

§ 691.11 Reinstatement

(a) Any attorney disbarred after hearings or by consent, or whose name has been stricken from the rule of attorneys pursuant to subdivision 4 of section 90 of the Judicial Law or section 691.9 of this Part may not apply for reinstatement until the expiration of at least seven years from the effective date of the disbarment or removal. Any attorney suspended under the provisions of this Part shall be entitled to apply for reinstatement at such intervals as this court may direct in the order of suspension or in any modification thereof.

(b) Such application may be granted by this court only upon a showing by the applicant:

(1) by clear and convincing evidence that he has fully complied with the provisions of the order disbarring or suspending him or finding his name from the rule of attorneys, and that he possesses the character and general fitness to practice law; and

(2) that, subsequent to the entry of such order, he has taken, and attained a passing score on, the Multistate Professional Responsibility Examination described in section 520.8(a) of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law, the passing score thereon being that determined by the New York State Board of Law Examiners pursuant to section 520.8(c) of such rules.

This court will refer such application to the Committee on Character and Fitness in this judicial department or to a referee, justice or judge for a report before granting such application.

(c) This court in its discretion may direct that the necessary expenses incurred in the investigation and processing of an application for reinstatement be paid by the attorney.

(d) An individual applying for reinstatement shall serve a copy of such application upon the appropriate grievance committee and the Lawyers' Fund for Client Protection and such committee may be heard in opposition to the application.

§ 691.12 Regulations and Procedures for Random Review and Audit and Biennial Affirmation of Compliance

(a) Availability of Bookkeeping Records; Random Review and Audit. The financial records required by DR 9-102 shall be available at the principal New York State office of the attorneys subject hereto, for inspection, copying and

determination of compliance with DR 9-102, to a duly authorized representative of the court pursuant to the issuance, on a randomly selected basis, of a notice or subpoena by this Court or the appropriate Grievance Committee.

(b) Confidentiality. All matters, records and proceedings relating to compliance with DR 9-102, including the selection of an attorney for review hereunder, shall be kept confidential in accordance with applicable law, as and to the extent required of matters relating to professional discipline.

(c) Prior to the issuance of any notice or subpoena in connection with the random review and audit program established by this section, the appropriate Grievance Committee shall propose regulations and procedures for the proper administration of the program. The Court shall approve such of the regulations and procedures of the Grievance Committee as it may deem appropriate, and only such regulations and procedures as have been approved by the Court shall become effective.

(d) Any attorney subject to this court's jurisdiction shall execute that portion of the biennial registration statement provided by the Office of Court Administration affirming that the attorney has read and is in compliance with DR 9-102 of the Lawyers Code of Professional Responsibility. The affirmation shall be available at all times to the Grievance Committees. No affirmation of compliance shall be required from a full-time judge or justice of the unified court system of the State of New York or of a court of any other state, or of a federal court.

§ 691.13 Proceedings Where Attorney Is Declared Incompetent or Alleged to Be Incapacitated

(a) Suspension Upon Judicial Determination of Incompetency or on Involuntary Commitment. Where an

attorney subject to the provisions of section 691.1 of this Part has been judicially declared incompetent or involuntarily committed to a mental hospital, this court, upon proper proof of the fact, shall enter an order suspending such attorney -from the practice of the law, effective immediately and for an indefinite period and until the further order of this court. A copy of such order shall be served upon such attorney, his committee, and/or the director of the mental hospital in such manner as this court may direct.

Appendix J

State of New York
Grievance Committee for the
Ninth Judicial District

Crosswest Office Center
399 Knollwood Road, Suite 200
White Plains, New York 10603

Edward I. Sumber
Chairman
Gary L. Casella
Chief Counsel
Etta M. Biloon
Deputy Counsel
Gary D. Egerman
Maryann Yanarella
Sondra S. Holt
Associate Counsel

May 23, 1991

CONFIDENTIAL

Diana Maxfield Kearse, Esq.
Principal Law Assistant to
Justice Mangano
Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, New York 11201

Re: William B. Falow, Esq.

Dear Ms. Kearse:

Enclosed, as per your request, is the information on the above referenced attorney.

Very truly yours,

MY:mjm
Enclosures

Maryann Yanarella
Associate Counsel

State of New York
Grievance Committee for the
Ninth Judicial District

Crosswest Office Center
399 Knollwood Road, Suite 200
White Plains, New York 10603

Edward I. Sumber
Chairman
Gary L. Casella
Chief Counsel
Etta M. Biloon
Deputy Counsel
Gary D. Egerman
Maryann Yanarella
Sondra S. Holt
Associate Counsel

May 23, 1991

CONFIDENTIAL

Resp. Ex. K
for ident.
6/7/94
F.P.

Diana Maxfield Kearse, Esq.
Principal Law Assistant to
Justice Mangano
Appellate Division
Second Judicial Department
45 Monroe Place
Brooklyn, New York 11201

Re: William B. Falow, Esq.

Dear Ms. Kearse:

Enclosed, as per your request, is the information on the above referenced attorney.

Very truly yours,

MY:mjm
Enclosures

Maryann Yanarella
Associate Counsel

Appendix K

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED) 8410 b
B/ni

GUY JAMES MANGANO. PJ.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

90-08145

DECISION & ORDER ON MOTION

In the Matter of William B. Falow, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District petitioner:
William B. Falow, respondent.

Motion by the respondent, William B. Falow, for an order, inter alia, dismissing the petitions against him and Lance Falow, with prejudice; directing designated staff of this court and the Grievance Committees to submit to depositions for the purpose of ascertaining whether ex parte occurred between the Grievance Committee and the court; and directing the petitioner and designated staff members to permit the respondent access to their private files.

Upon the papers submitted in support of the motion

and the papers filed in opposition thereto. it is

ORDERED that the motion is denied in its entirety and the respondent's time to submit an answer is extended to ten (10) days after his receipt of the order.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and O'BRIEN. JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 15, 1993

Appendix L

GUY JAMES MANGANO, PJ. 7217 T
WILLIAM C. THOMPSON B/kr
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
CORNELIUS J. O'BRIEN, JJ.

90-08145 Atty. DECISION & ORDER OF SUSPENSION

In the Matter of William B. Falow, an attorney and counselor-at-law.

Grievance Committee: for the Ninth Judicial District, petitioner,

William B. Falow, respondent

Motion by the petitioner to suspend the respondent from the practice of law pending the outcome of a disciplinary proceeding based upon, inter alia, uncontroverted evidence of professional misconduct immediately threatening the public interest and to authorize the institution of a disciplinary proceeding against the respondent. The respondent was admitted to the practice of law by the Appellate Division, First Judicial Department, on December 11, 1961.

Upon the papers filed in support of the motion and the papers filed in opposition thereto. it is

ORDERED that the motion is granted; and it is further,

ORDERED that the respondent, William B. Falow, pursuant to Section 691.4(1) of the Rules Governing

the Conduct of Attorneys (22 NYCRR 691.4[1]) is immediately suspended from the practice of law in the State of New York, based upon uncontroverted evidence of professionals misconduct, until the further order of this court, and it is further,

ORDERED that William B. Falow shall promptly comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent, William B. Falow, is commanded to desist and refrain (1) from practicing law in any form, either as principal or as agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice. board, commission or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding himself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that the Grievance Committee for the Ninth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against the said William B. Falow based on the acts of professional misconduct set forth in the affirmation of counsel to the Grievance Committee dated October 31, 1990, and it is further,

ORDERED that Gary L. Casella, Chief Counsel to the Grievance Committee for the Ninth Judicial District. 399 Knollwood Road, White Plains, New York 10603, is hereby appointed as attorney for the petitioner in such proceeding.

MANGANO, P.J. THOMPSON, BRACKEN, KUNZEMAN and O'BRIEN, JJ., concur.

ENTER

MARTIN H. BROWNSTEIN
Clerk

June 10, 1991

Appendix M

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
CORNELIUS J. O'BRIEN, JJ.

90-08145 Atty.

DECISION & ORDER ON MOTION

In the Matter of William B. Falow,
a suspended attorney.

Grievance Committee for the Ninth
Judicial District, petitioner;

William B. Falow, respondent.

Motion by the respondent (1) for reargument of so much of a decision and order of this court dated June 10, 1991 as granted that branch of a motion by the petitioner to suspend the respondent from the practice of law pending the outcome of a disciplinary proceeding against him; (2) upon reargument, to vacate Or modify the provision of the decision and order suspending him from the practice of law; (3) for leave to appeal to the Court of Appeals; (4) for a direction to the petitioner Grievance Committee to immediately file formal charges and for an expedited plenary hearing thereon; and (5) for a stay of the decision and order dated June 10, 1991, suspending him from the practice of law.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted to the extent that the branches of the motion which were for reargument of the decision and order of this court dated June 10, 1991, and thereupon to vacate the suspension of the respondent from the practice of law are granted; and it is further,

ORDERED that, upon reargument, the branch of the motion by the petitioner which sought to suspend the respondent from the practice of law pending the outcome of a disciplinary proceeding against him is denied; and it is further,

ORDERED that the order of this court dated June 10, 1991, is amended accordingly by (1) adding to the first decretal paragraph thereof after the word " granted," the words "to the following extent, and is otherwise denied" and (2) by striking the second, third and fourth decretal paragraphs thereof; and it is further,

ORDERED that the respondent is reinstated to his former status as an attorney and counselor-at-law and the Clerk of the Court is directed to restore the name of William B. Falow to the roll of attorneys and counselors-at-law; and it is further,

ORDERED that the motion is otherwise denied.

MANGANO, P.J., THOMPSON, BRACKEN, KUNZEMAN and O'BRIEN, JJ., concur.

ENTER:
August 19, 1991

Martin H. Brownstein
Clerk

Appendix N

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED) 841 b
B/ni

GUY JAMES MANGANO. PJ.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

90-08145

DECISION & ORDER ON MOTION

In the Matter of William B. Falow, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District petitioner:

William B. Falow, respondent.

Motion by the respondent, William B. Falow, for an order, inter alia, (1) vacating this court's order of June 10, 1991, which authorized the commencement of a disciplinary proceeding against him and dismissing all charges set forth therein; (2) vacating the ex parte Order to Disclose of unknown date in 1991; (3) compelling the petitioner to disclose to the respondent and his counsel the names of any person or agencies to whom enclosure was made, the contents and dates of such information, copies

of any written material divulged and the time, place and substance of all oral communications with such persons or agencies; and (4) leave to appeal to the Court of Appeals from any portion of the instant application denied by this court.

Upon the papers submitted in support of the motion and the papers filed in opposition thereto. it is

ORDERED that the motion is denied in its entirety.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and O'BRIEN. JJ., concur.

ENTER: Martin H. Brownstein

April 15, 1993 Clerk

Appendix O

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED) 8409 b
B/ni

GUY JAMES MANGANO. PJ.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

90-08145

DECISION & ORDER ON MOTION

In the Matter of William B. Falow, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District petitioner:

William B. Falow, respondent.

Proceeding pursuant to statute (Judiciary Law §90) to discipline the respondent, William B. Falow, an attorney and counselor-at-law, who was admitted to practice by the Appellate Division of the Supreme Court, First Judicial Department on December 11, 1961.

Upon the papers submitted in support of the motion and the papers filed in opposition thereto. it is

ORDERED that the issues raised by the petition and

the respondent's answer to be served are referred to the Hon. George J. Balbach, a retired Justice of the Supreme Court, Queens County, 34-05 80th Street, Jackson Heights, New York 11372, as Special Referee to hear and report, together with his findings on the issues.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and O'BRIEN. JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 15, 1993

Appendix P

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED) 9828 L
S/em

GUY JAMES MANGANO. PJ.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

90-08145

DECISION & ORDER ON MOTION

In the Matter of William B. Falow, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District petitioner:

William B. Falow, respondent.

Motion by the respondent, William B. Falow, for 1) the issuance of a "so ordered" subpoena duces tecum for all records maintained by the Clerk of the Court relative to the instant proceeding; 2) for the issuance of additional subpoenas compelling the production of documents in the possession of the Grievance Committee for the Ninth Judicial District and the appearances of designated court personnel to give testimony at the instant proceeding, or in the alternative, 30 for an order authorizing and directing the

Special Referee to issue the aforesaid subpoenas, or, in the alternative, 4) that the court declare that the attorney of record for the respondent may issue subpoenas to any individual witness; and 5) that the court enter an order directing the Special Referee to permit the respondent to conduct such a discovery as is necessary and proper to the defense of the charges. The respondent was admitted to practice by the Appellate Division, First Judicial Department on December 11, 1961.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied in its entirety.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and O'BRIEN. JJ., concur.

ENTER: Martin H. Brownstein
Clerk

March 3, 1995

Appendix Q

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED) 3469 C
S/hu

GUY JAMES MANGANO. PJ.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

90-08145

DECISION & ORDER ON MOTION

In the Matter of William B. Falow, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District petitioner:

William B. Falow, respondent.

Petitioner Grievance Committee for the Ninth Judicial District moved for an order authorizing it to institute and prosecute a disciplinary proceedings against the respondent, William B. Falow, an attorney and counselor-at-law. who was admitted to the practice of law at a term of the Appellate Divisions First Judicial Department on December 11, 1961. By decision and order of this court dated April 15, 1993, the court authorized the petitioner to institute and prosecute a disciplinary proceeding, based upon acts of professional misconduct set forth in the

confidential report and the matter was referred to the Honorable George J. Balbach. as a Special Referee to hear and report. After hearing the matter, the Honorable George J. Balbach died.

Upon the court's own motion. and due to the death of the Honorable George J. Balbach. it is

ORDERED that the issues raised by the petition and answer are referred to the Honorable John A. Monteleone, a retired Justice of the Supreme Court, 16 Court Street, Suite 2600, Brooklyn, NY 11241. as Special Referee to review the record of the proceedings before the late George J. Balbach. to hold such further hearings, if any as in his discretion are necessary to enable him to make findings on the issues raised by the pleadings and to report his findings on the issues.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and O'BRIEN. JJ., concur.

ENTER:
May 6, 1996

Martin H. Brownstein
Clerk

Appendix R

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED) 1022 Y
S/hu

GUY JAMES MANGANO. PJ.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
CORNELIUS J. O'BRIEN, JJ.

90-08145

DECISION & ORDER ON MOTION

In the Matter of William B. Falow, an attorney and counselor at law.

Grievance Committee for the Ninth Judicial District petitioner:

William B. Falow, respondent.

Motion by the respondent to (1) vacate the report of the Honorable John A. Monteleone dated August 30, 1996, as replacement Special Referee for the late Honorable George J. Balbach, and to deem the report of no further force and effect, (2) direct a new hearing and the finding of testimony on all issues of fact raised with respect to each charge of the petition, as put in issue by his answer, (3) direct that the hearing be referred to another Special Referee, and (4) hold in abeyance the Grievance Committee's pending motion to confirm/disaffirm the report

of the Special Referee until determination of this motion. The respondent was admitted to the practice of law by the Appellate Division, First Judicial Department on December 11, 1961.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied in its entirety.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and O'BRIEN. JJ., concur.

ENTER:
January 14, 1997

Martin H. Brownstein
Clerk

Appendix S

Jurisdictions Employing A Preponderance of Evidence Standard

1. In re Disney, 922 S.W. 2d 12 (MO. 1996)
2. Burrell v. Disc. Board of Alaska Bar Association, 702 p.2d 240 (Alaska 1985)
3. Kelley's Case, 627 A.2d 527 (N.H. 1993)
4. Office of Disc. Counsel v. Duffield, 644 A2d 1186 (PA. 1994)
5. McInnis v. State, 618 S.W.2d 389 (Texas Civ. App. 181)

Jurisdictions Employing A Clear and Convincing Evidence Standard

Federal

1. In re Medrano, 456 F.2d 101 (5th Cir. 1992)
2. United States District Court for the Eastern District of Washington v. Sandlin, 12 F.3d 861 (9th Cir. 1995)
3. NE Insurance Company v. Sylvia, 783 F. Supp.6 (D.N.H. 1991)
4. In re Placid Oil, 158 B.R. 404 (N.D. Tex. 1993)
5. In re Caryton, 192 B.R. 970 (9th BAP Cal. 1991)

State

1. Iowa Supreme Court v. Winkel, 542 NW2d (Iowa 1996)
2. Huckaby v. Ala State Bar, 631 So. 2d. 855 (1993)
3. Matter of Curtis, 908 P.2d 472 (AZ. 1993)
4. In re Morse, 900 P2d 1 (Col. 1996)
5. People v. Varallo, 913 P.2d 1 (Col. 1996)

6. Lewis v. Statewide Grievance Co, 669 A.2d 1202 (Co. 1996)
7. Matter of Mcann, 669 A.2d 49 (Del. Supr. 1995)
8. In re Gardner, 650 A.2d 693 (D.C. App. 1994)
9. Florida Bar v Marable, 645 So. 2d 438 (Fla. 1994)
10. Idaho State Bar v. Tway, 919 P.2d 323 (IO. 1996)
11. In re Blank, 585 NE2d 105 (Ill. 1991)
12. Matter of Anonymous, 655 NE2d 67 (Ind. 1995)
13. Matter of McIntosh, 912 P.2d 182 (Kan. 1996)
14. In re D'Amico, 668 So. 2d 730 (LA 1996)
15. Commissioner of Maryland v. Glenn, 671 A.2d 463 (Md. 1996)
16. In re Disc. Action v. Strid, 551 N.W.2d 212 (Minn. 1996)
17. Goodsell v. The Mississippi Bar, 667 So.2d 7 (Miss. 1996)
18. State ex rel Nebraska Bar v. Schmeling, 529 N.W. 2d 799 (Neb. 1995)
19. In re Discipline of Drakulich, 908 p.2d 809 (Nev. 1995)
20. Matter of Shelly, 659 A.2d 460 (N.J. 1995)
21. Matter of Disc. Action v. Lochow, 502 N.W.2d 252 (N.D. 1993)
22. North Carolina State Bar v. Whitted, 347 S.E.2d 460 (N.C. App. 1986)
23. Columbus Bar Association v. Winkfield, 664 N.E.2d 902 (Ohio 1996)
24. State ex rel Oklahoma Bar Association v. Wilkins, 898 p.2d 147 (Okla. 1995)
25. In re conduct of Claussen, 909 p.2d 862 (OR. 1996)
26. Lawyer Dis. Board v. Cunningham, 464 S.E.2d 181 (W.Va. 1995)
27. Myer v. Norman, 780 p.2d 283 (Wyo. 1989)
28. Matter of Disc. Proceedings v. Camacho, 375 N.W.2d 204 (Wis. 1985)

Supreme Court, U.S.
FILED
NOV 24 1998
CLERK

No. 98-622

In The

Supreme Court of the United States

October Term, 1998

WILLIAM B. FALOW,

Petitioner,

vs.

NEW YORK STATE GRIEVANCE COMMITTEE
FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Appellate Division, Second Judicial Department of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

GARY L. CASELLA
Counsel of Record
GRIEVANCE COMMITTEE FOR
THE NINTH JUDICIAL DISTRICT
Attorney for Respondent
399 Knollwood Road
Suite 200
White Plains, New York 10603
(914) 949-4540

MARYANN YANARELLA
Of Counsel

149842

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Preliminary Statement	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	6
Jurisdiction On Writ Of Certiorari Is Not Warranted In This Matter.	6
I. Petitioner's Contention That The Various Disciplinary Functions Were Combined In Violation Of Due Process Is Without Merit.	7
II. There Was No Violation Of Due Process When Special Referee John A. Monteleone Issued His Findings Without Deeming It Necessary To Conduct Any Further Hearings.	11
III. There Was No Violation Of Due Process When Petitioner Was Denied Examination Of The Contents Of A File Allegedly Maintained By The Clerk Of The Appellate Division Nor Were Transcripts In Other Proceedings Used Against Petitioner.	16
IV. The Standard Of Proof In A Disciplinary Proceeding In New York Is Appropriate To The Interest At Stake.	20
Conclusion	23

TABLE OF CITED AUTHORITIES

Page

Cases:

A to Z Assocs. v. Cooper, 161 Misc. 2d 283 (1993) ... 21

Addington v. Texas, 441 U.S. 418 (1970) 21

Ausch v. St. Paul Fire Ins., 125 A.D. 2d 43 (2d Dept. 1987) 21

Barsky v. Board of Regents, 347 U.S. 442 (1954) 17

Belsky v. NYC Transit Authority, 48 N.Y. 2d 908 (1979) 13

Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) 21

D.M.W. Contracting Co. v. Stolz, 158 F.2d 405 (1946), *cert. denied*, 330 U.S. 839 (1947) 14

Ex parte Secombe, 60 U.S. 9 (1857) 7

Ex parte Wall, 107 U.S. 265 (1882) 22

Friedman v. New York, 24 N.Y. 2d 528 (1969) 8, 9

Friedman v. New York, 397 U.S. 317 (1970) 9

FTC v. Cement Institute, 333 U.S. 683 (1948) 10

In re Feola, 37 A.D. 2d 654 (3rd Dept. 1971) 21

Cited Authorities

	Page
In re Friedman, 196 A.D. 2d 280 (1st Dept. 1994), *appeal dismissed*, 83 N.Y. 2d 888 (1994), *cert. denied*, 513 U.S. 820 (1994)	20
In re O'Neill, 184 A.D. 2d 75 (1st Dept. 1918)	13
In re Ruffalo, 390 U.S. 544 (1968)	11
Matter of Andrews, 184 A.D. 2d 195 (1st Dept. 1992)	21
Matter of Bruce, 162 A.D. 2d 79 (1990)	13
Matter of Bruce, 77 N.Y. 2d 986 (1991)	13
Matter of Capoccia, 59 N.Y. 2d 549 (1983)	11, 20
Matter of Dondi, 63 N.Y. 2d 331 (1984)	11
Matter of Falow, 231 A.D. 2d 201 (2d Dept. 1997)	1
Matter of Falow, 90 N.Y. 2d 1007 (1997)	1, 11
Matter of Falow, 92 N.Y. 2d 806 (1998)	1
Matter of Friedman, 196 A.D. 2d 280 (1st Dept. 1994)	21
Matter of Mahot, 222 N.Y. 8 (1917)	10
Matter of Mogil, 88 N.Y. 2d 729 (1996)	21

Cited Authorities

	Page
Matter of Shea, 271 A.D. 594 (1st Dept. 1946)	12
Matter of Zuckerman, 20 N.Y. 2d 430 (1967)	16
Mildner v. Gulotta, 405 F. Supp. 182 (1975), *aff'd*, 425 U.S. 901 (1975)	13, 14
Orbit Holding Corp. v. Anthony Hotel Corp., 121 A.D. 2d 311 (1st Dept. 1986)	21
Ortiz v. Lesser, 83 A.D. 2d 663 (1981)	13
People v. Thompson, 90 N.Y. 2d 615, *aff'g*, 222 A.D. 2d 156 (1997)	15
Richardson v. Perales, 402 U.S. 389 (1971)	10
Santosky v. Texas, 455 U.S. 745 (1982)	21
Thaler v. Casella, 960 F. Supp. 691 (1997)	10
United States v. Raddatz, 447 U.S. 667 (1980)	14
United States v. Salerno, 481 U.S. 739 (1987)	21
United States v. Vater, et al., 259 F.2d 667 (1959) ...	14
Withrow v. Larkin, 423 U.S. 35 (1975)	10

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1257(a)	1
Judiciary Law § 21	13
Judiciary Law § 90	8, 13
Judiciary Law § 90(7)	8
Judiciary Law § 90(8)	10
Judiciary Law § 90(10)	19
United States Constitution:	
Fifth Amendment	17
Rules:	
Federal Rule of Criminal Procedure 25(a)	15
United States Supreme Court Rule 10	6
United States Supreme Court Rule 10.1	7

Cited Authorities

Page

Other Authorities:

22 NYCRR § 691.4 8

22 NYCRR § 691.4(l)(1) 1

22 NYCRR § § 691.6(d) 19

New York State Constitution, Article 6, § 3 10

PRELIMINARY STATEMENT

This brief is submitted in opposition to petitioner's application for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated June 23, 1997 which sustained eighteen charges of professional misconduct, in toto, and a nineteenth charge of professional misconduct, in part, and disbarred petitioner from the practice of law (Petitioner's App., 1a). *Matter of Falow*, 231 A.D. 2d 201 (2d Dept. 1997). After a *sua sponte* examination, based upon arguments presented by petitioner and opposition by respondent, the Court of Appeals of the State of New York, by order dated October 23, 1997, dismissed petitioner's appeal as of right, upon the ground that no substantial constitutional question was directly involved (Petitioner's App., 8a). *Matter of Falow*, 90 N.Y. 2d 1007 (1997).

The Appellate Division, Second Judicial Department, by order dated April 21, 1998, denied petitioner's motion for leave to appeal (Petitioner's App., 10a). Similarly, on July 9, 1998, the Court of Appeals denied petitioner's motion for leave to appeal (Petitioner's App., 11a). *Matter of Falow*, 92 N.Y. 2d 806 (1998).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On November 2, 1990, respondent moved before the Appellate Division by Order to Show Cause, pursuant to 22 NYCRR § 691.4(l)(1), (Petitioner's App., 37a), for an order

authorizing a disciplinary proceeding against petitioner and suspending him from the practice of law pending the outcome of such proceeding. Petitioner opposed this application. By order of the Appellate Division, dated June 10, 1991, prosecution of a disciplinary proceeding was authorized and petitioner was suspended from the practice of law pending the outcome of that proceeding (Petitioner's App., 54a).

By Order to Show Cause, dated July 8, 1991, petitioner sought reargument of the order of suspension and urged that said suspension be vacated or modified. By order of the Appellate Division, dated August 19, 1991, reargument was granted and, upon reargument, that branch of the motion seeking petitioner's suspension from the practice of law pending the outcome of a disciplinary proceeding was denied and he was reinstated to the practice of law (Petitioner's App., 56a).

On May 6, 1992, a Notice of Petition and Petition were personally served on petitioner. Said Petition contained thirty charges of professional misconduct. Petitions were also served on two other attorneys involved with petitioner regarding the transactions which served as the bases of the charges against them. Simultaneously, respondent brought a motion for a joint hearing with petitioner and the two other attorneys. At the request of petitioner and the two other attorneys, Answers to the Petitions were held in abeyance pending the decision on the joint hearing motion. By order dated November 9, 1992, the motion for a joint hearing was denied.

By Order to Show Cause dated December 10, 1992, petitioner sought an order *inter alia*, dismissing the Petition against himself and one of the other attorneys. He alleged *ex parte* communications by respondent with the Court and that the Appellate Division maintained a "private file" on him. He sought depositions of counsel to respondent and court personnel.

By Order to Show Cause, dated January 8, 1993, petitioner sought an order *inter alia*, vacating the order of June 10, 1991 which authorized the commencement of a disciplinary proceeding, dismissing all charges, seeking a copy of an order to disclose and the papers upon which it was issued and disclosure to him of what he alleged was a "private file" maintained by the Appellate Division.

On April 15, 1993, the Appellate Division issued orders denying in their entirety both applications brought by petitioner and extending his time to submit an answer to ten days after receipt of the order denying the first application (Petitioner's App., 52a, 60a).

By order dated April 15, 1993, the Appellate Division referred the issues raised by the Petition and petitioner's expected Answer to the Honorable George J. Balbach, a retired Justice of the Supreme Court, Queens County, to hear and report, together with his findings on the issues (Petitioner's App., 60a). On or about May 4, 1993, petitioner served his Answer to the Petition.

On or about May 17, 1993, petitioner made a motion for leave to appeal to the Court of Appeals based on several of the same issues raised in his instant appeal. By order dated July 9, 1993, this was dismissed (Petitioner's App., 62a).

Prehearing conferences before the Honorable George J. Balbach were held on September 9 and October 25, 1993, at the offices of respondent. The hearing of the disciplinary proceeding took place before the Honorable George J. Balbach at the Richard A. Daranco Courthouse, White Plains, New York. The hearing commenced on January 25, 1994 and concluded on December 28, 1995.

During the hearing of the disciplinary proceeding, petitioner brought another motion before the Appellate Division seeking *inter alia* the issuance of subpoenae for records maintained by the Clerk of the Court and for the appearance of counsel to respondent and court personnel. The motion was denied by order dated March 3, 1995.

Petitioner's counsel then served subpoenae on the same designated individuals causing the respondent to move before the Special Referee to quash the subpoenae. The Special Referee granted the motion to quash.

Proposed Findings and Replies were fully submitted to the Honorable George J. Balbach by April 3, 1996. Due to the death of the Honorable George J. Balbach, by order dated May 6, 1996, the Petition and Answer in this disciplinary proceeding were referred to the Honorable John A. Monteleone (Petitioner's App., 64a). Petitioner, as is his practice, now falsely and deliberately accuses the Special Referee of concealing from the parties that his report would only be based upon his review of the transcripts and exhibits generated by the previous hearings. The order clearly put the parties on notice that the Special Referee was to review the record of the proceedings, *to hold such further hearings, if any, as in his discretion were necessary to enable him to make findings on the issues raised* by the pleadings and to report his findings on the issues. (Emphasis added).

By Report, dated August 30, 1996, and received by the respondent on September 19, 1996, the Honorable John A. Monteleone issued his findings in this disciplinary proceeding. On or about September 24, 1996, respondent brought a motion to confirm, in part, and to disaffirm, in part, the Report of the Special Referee.

Petitioner sought by Order to Show Cause, dated October 15, 1996, to vacate the Report of the Special Referee, to direct a hearing *de novo*, and to stay the Committee's pending motion to confirm/disaffirm. On or about October 25, 1996, petitioner brought a cross-motion to affirm/disaffirm the Report of the Special Referee.

By order dated January 14, 1997, petitioner's application seeking to vacate the Report of the Special Referee, to direct a hearing *de novo*, and to stay respondent's pending motion to confirm/disaffirm was denied. By order dated June 23, 1997, the Appellate Division sustained Charges 2, 3, 4, 5, 7, 8, 9, 10, 12, 13, 14, 18, 19, 23, 25, 27, 28, 20 and Charge 26 solely with respect to failing to account for clients' and third parties' funds. Charges 1, 6, 11, 17, 21, 22, 24 and 30 were not sustained. Petitioner was disbarred from the practice of law, effective immediately (Petitioner's App., 66a).

Thereafter, petitioner filed a notice of appeal and motions for leave to appeal which were denied.

Petitioner claims that his defense was impaired by delay and the length of the hearings. Any delays in investigating the complaints of professional misconduct and in prosecuting the disciplinary proceeding were directly attributable to petitioner. He provided false and misleading answers to the original complaints, gave false and misleading testimony under oath, brought on numerous, repetitive and frivolous motions, made several applications for interlocutory appeals, initiated federal actions and sought numerous adjournments during the hearing of the disciplinary proceeding.

REASONS FOR DENYING THE WRIT

JURISDICTION ON WRIT OF CERTIORARI IS NOT WARRANTED IN THIS MATTER.

Rule 10 of the United States Supreme Court Rules is entitled "Considerations Governing Review on Writ of Certiorari" and, in relevant part, states:

> 1. A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

United States Supreme Court Rule 10.

Although Rule 10.1 is not exhaustive, the facts of the instant matter do not even remotely relate to the "character of reasons" that this Court will consider for a petition for a writ of certiorari.

The issues involved in the instant matter do not reach the constitutional dimensions to be addressed by the United States Supreme Court. Petitioner has continually misstated the facts and attempted to manufacture issues by couching them in terms of "due process." Petitioner's real objection is that, despite his strenuous efforts, he has been prevented from completely obstructing the disciplinary process and is now disbarred.

The New York State Court of Appeals in its decision denying appeal as of right, clearly apprehended that no substantial constitutional question is directly involved. Both that court and the Appellate Division have dealt with petitioner's arguments on numerous occasions and have correctly determined that the claims raised by petitioner are meritless. Since none of the arguments advanced by petitioner involves important questions of federal law that have not been, but should be, settled by this Court, further consideration of petitioner's claims by this Court is not warranted.

I.

PETITIONER'S CONTENTION THAT THE VARIOUS DISCIPLINARY FUNCTIONS WERE COMBINED IN VIOLATION OF DUE PROCESS IS WITHOUT MERIT.

This Court has long recognized that it rests exclusively with the courts, who may be admitted to the practice of law as an attorney, who may be removed from the practice of law, the offenses for which an attorney may be removed and the means of proceeding against an attorney. *Ex parte Secombe*, 60 U.S. 9 (1857).

The basic statutory framework for the admission and discipline of attorneys in New York State is found in Judiciary Law § 90 (Petitioner's App., 14a). Judiciary Law § 90(7) gives the Appellate Division the power to appoint any attorney to conduct a preliminary investigation and to prosecute any disciplinary proceeding. § 691.4 of the Rules of Conduct of Attorneys (Petitioner's App., 33a) provides for the appointment of the grievance committees in the Second Judicial Department.

Petitioner was served with five complaints of professional misconduct by respondent and was given the opportunity to submit answers to each. He did so, and in each provided false and misleading information. Thereafter, the investigations conducted by respondent afforded petitioner several opportunities to testify regarding his conduct in each of the real estate transactions underlying the complaints. Petitioner did so, and provided false and misleading testimony under oath during his appearances. Following a thorough and lengthy investigation, respondent determined that there was sufficient cause to seek authorization from the Appellate Division for disciplinary proceedings against petitioner and two other attorneys involved in the underlying real estate transactions.

Based upon the application by respondent and opposition by petitioner, the Appellate Division reviewed the matters presented to it to determine whether there were sufficient grounds for the preferral of charges. Under similar circumstances, the New York State Court of Appeals decided that the Court on the Judiciary was not the accuser nor did it have an interest in the outcome of the case because it reviewed allegations to determine whether basis existed for preferral of charges. Far from prejudging the facts, the Court on the Judiciary merely determined whether as a matter of law there were facts sufficient to constitute grounds for the preferral of charges. *Friedman v. New York*, 24 N.Y. 2d 528, 543-544

(1969). This Court dismissed an appeal in that matter for want of a substantial federal question. *Friedman v. New York*, 397 U.S. 317 (1970).

The charges against petitioner were preferred by respondent through counsel designated by the court. The charges were heard by a Special Referee designated by the court to hear and report. Again, in *Friedman*, at 544, the Court of Appeals pointed out that because charges are preferred by counsel designated by the court, it cannot be assumed that the court became so intimately involved with the case as to deprive claimant of an impartial tribunal.

Further, in *Friedman*, at 544, the Court of Appeals held that,

> To the extent the Court on the Judiciary sits to supervise the conduct of the members of the Judiciary of this State, and like an administrative agency which may remove an employee for cause, where a combination of functions is traditional, so too that combination of functions may, consonant with due process, exist in the Court on the Judiciary.

It follows that to the extent that the Appellate Division sits to supervise the conduct of members of the bar a combination of functions may exist in that court consonant with due process.

If one were to accept the arguments as presented by petitioner, almost no administrative or disciplinary system could pass muster. Most have a combination of functions. This is not only true of the discipline of attorneys, on both the federal and state levels, but of the disciplinary systems involving civil service employees, physicians, real estate brokers, certified public accountants, notary publics and mortgage brokers, to name just a few.

This Court has also rejected the argument that the combination of investigative and adjudicative functions does not, without more, constitute a due process violation. *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Richardson v. Perales*, 402 U.S. 389 (1971); *Withrow v. Larkin*, 423 U.S. 35 (1975).

Petitioner has attempted through his numerous applications and appeals to create the "more" through various constitutional due process claims which have repeatedly been rejected. Petitioner's real motivation is that he disagrees with the order sustaining nineteen charges of professional misconduct and that he was disbarred for that misconduct.

Petitioner's blatant misstatement regarding the holding in *Matter of Mahot*, 222 N.Y. 8 (1917), to the effect that there is no appeal as of right in New York State, is an example of such creativity. Petitioner should be well aware of this since he was a plaintiff in *Thaler v. Casella*, 960 F. Supp. 691 (1997) wherein the court discussed that attorneys are entitled, pursuant to Judiciary Law § 90(8), as of right to appeal the outcome of a disciplinary proceeding, subject to the limitations prescribed in the New York State Constitution dealing with the jurisdiction of the Court of Appeals. *Thaler*, at 699. Article 6, § 3 of the New York State Constitution, in relevant part, gives jurisdiction to the Court of Appeals in civil cases and proceedings, as follows:

> (1) As of right, from a judgment or order entered upon the decision of an appellate division of supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

Petitioner brought an appeal as of right and it was dismissed by the Court of Appeals as that court determined that no substantial constitutional question was directly involved. *Matter of Falow*, 90 N.Y. 2d 1007 (1997).

II.

THERE WAS NO VIOLATION OF DUE PROCESS WHEN SPECIAL REFEREE JOHN A. MONTELEONE ISSUED HIS FINDINGS WITHOUT DEEMING IT NECESSARY TO CONDUCT ANY FURTHER HEARINGS.

The practice of law in the State of New York is a privilege, not a right. *Matter of Dondi*, 63 N.Y. 2d 331 (1984); *Matter of Capoccia*, 59 N.Y. 2d 549 (1983). An attorney who is the subject of a disciplinary proceeding which could potentially lead to his disbarment is entitled to procedural due process, including a fair notice of the charges and an opportunity to be heard. *In re Ruffalo*, 390 U.S. 544 (1968).

In the case at bar, petitioner had notice of the thirty charges of professional misconduct contained in the Petition served upon him. He was afforded a full and lengthy evidentiary hearing before the Special Referee George J. Balbach appointed by the Appellate Division "to hear and report, together with his findings upon each of the issues." Petitioner had the opportunity to refute any evidence produced by respondent and to cross-examine witnesses against him. He also had the opportunity to produce witnesses and introduce documents into evidence on his own behalf.

Following the unfortunate death of the Honorable George J. Balbach, by order of the Appellate Division, dated May 6, 1996, the issues raised by the Petition and Answer in this disciplinary proceeding were referred to the Honorable John

A. Monteleone, as Special Referee, to review the record of the proceedings before the late George J. Balbach, *to hold such further hearings, if any, as in his discretion are necessary to enable him to make findings* on the issues raised by the pleadings and to report his findings on the issues. (Emphasis added.)

Petitioner made no effort to object to this order or to seek a hearing *de novo* immediately following the issuance of the order of May 6, 1996.

Almost four months later, on August 30, 1996, the Honorable John A. Monteleone, issued his Report to the Appellate Division as he apparently did not find it necessary, in his discretion, to hold further hearings. What is most significant is that, during that time, petitioner who had continually and repetitively brought applications during the disciplinary proceeding, made no request to the Special Referee or to the Appellate Division for further hearings or to initiate a hearing *de novo*.

Petitioner apparently acquiesced in the order until confronted with the Report of the Special Referee which made findings against him.

There is no requirement that a successor Referee in a disciplinary proceeding must rehear the witnesses where the hearing has been concluded. While the court in *Matter of Shea*, 271 A.D. 594, 595 (1st Dept. 1946), chose to appoint a subsequent Special Referee to hold hearings, there is nothing mandating such a procedure.

The procedure of appointing a Special Referee to hold such further hearings as he deems necessary, upon the death of the Special Referee before whom a disciplinary proceeding was held, is not unique to petitioner's case. This is the same

procedure followed in the *Matter of Bruce*, 162 A.D. 2d 79 (1990). Mr. Bruce raised the same due process argument before the New York State Court of Appeals which dismissed his appeal on the basis that no substantial constitutional question was directly involved. *Matter of Bruce*, 77 N.Y. 2d 986 (1991).

Petitioner relies on Judiciary Law § 21 in support of the proposition that the Special Referee who rendered the Report should have heard and seen the witnesses. Petitioner's reliance is misplaced as Judiciary Law § 21 does not relate to the Appellate Division's authority in attorney disciplinary matters. Judiciary Law § 21 is limited to "a judge other than a judge of the court of appeals, or of the appellate division."

Petitioner has continually misrepresented the authority and role of a Special Referee in a disciplinary proceeding. Special Referees have no power to determine. *Mildner v. Gulotta*, 405 F. Supp. 182, 191 (1975), *aff'd*, 425 U.S. 901 (1975); *In re O'Neill*, 184 A.D. 2d 75 (1st Dept. 1918). It is the Appellate Division, pursuant to Judiciary Law § 90, which is the final arbiter of the facts and imposes whatever sanction is deemed appropriate. The Appellate Division is in no way bound by the findings of the Special Referee and must, itself, review the entire record. *Mildner*, at 194-196; *Belsky v. NYC Transit Authority*, 48 N.Y. 2d 908 (1979); *Ortiz v. Lesser*, 83 A.D. 2d 663 (1981).

The Appellate Division has not abdicated its responsibility simply because it has chosen to provide "the opportunity to be heard" before a Special Referee. For this reason, Special Referees in attorney disciplinary proceedings are not appointed to hear and determine. Rather, they are appointed to *hear and report* to the trier of fact, the Appellate Division.

The court in *Mildner v. Gulotta*, at 195, recognized that,

> The use of masters or referees as advisory triers-of-fact is a well-established instrument of busy appellate courts exercising original jurisdiction. The Supreme Court itself utilizes the practice when disputed factual issues appear in original actions.

The federal courts have recognized that due process does not demand under all circumstances that factual determinations be made by the person hearing the evidence. *United States v. Vater, et al.*, 259 F.2d 667, 672 (1959).

This Court in *United States v. Raddatz*, 447 U.S. 667 (1980) upheld a federal procedural mechanism which permitted a district court to refer a suppression motion in a criminal matter to a magistrate and authorized the district court to decide the motion based on the record developed before the magistrate, including the magistrate's proposed findings of fact and recommendations. The Court concluded that, even when the motion involved contested credibility assessments and was dispositive of the case, a *de novo* hearing before the district court was not constitutionally required.

A disciplinary proceeding is not a full-blown trial but an inquest, a gathering of facts concerning the conduct of an attorney, a subject more likely illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else. *Mildner v. Gulotta*, at 194. In the case at hand, even without considering the testimony of witnesses, there was an abundance of documentary evidence that proved respondent's intent and his misconduct.

In *D.M.W. Contracting Co. v. Stolz*, 158 F.2d 405 (1946), *cert. denied*, 330 U.S. 839 (1947) the District Court appointed

a master to take testimony upon the issues raised by the pleadings, to make findings and to report to the court. Before a report was made, the master died and his successor was directed to file his report based upon the existing record. The court issued a final judgment in which it adopted the findings of the master. The United States Court of Appeals upheld the procedure followed by the District Court and noted that there was no provision requiring the court to accept the report. The parties could file objections to the report, and request that the court take action upon the report. After a review of the entire record, the court could adopt the report, modify it or reject it in whole or part. It was the trial court which made the final determination of all issues, the report of the master was advisory only and without effect until the court took action. The federal court also concluded that the same result accrued whether or not the parties consented to the reference.

In *People v. Thompson*, 90 N.Y. 2d 615, *aff'g*, 222 A.D. 2d 156 (1997), the Court of Appeals reviewed the Appellate Division decision which held that it was proper for a judge in the middle of a criminal trial to be substituted for the original trial judge who had become incapacitated. The rationale underlying this decision is that it is the duty of the jury to find the facts and the judge is capable of carrying out the functions assigned to him such as making evidentiary rulings and charging the jury. The New York State Court of Appeals affirmed the order of the Appellate Division and noted that a jury trial before the same judge does not represent a nonwaivable common-law right.

Even the Federal Rules of Criminal Procedure provide for the substitution of a judge in a federal criminal trial when that judge becomes disabled or dies. Rule 25(a) provides:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced

> is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

Disciplinary proceedings are civil in nature and all of the constitutional rights afforded a criminal defendant do not apply. *Matter of Zuckerman*, 20 N.Y. 2d 430 (1967). Thus, if a judge in a criminal trial can be substituted without violating due process, then surely an attorney's due process rights are not violated when a Special Referee is substituted during a disciplinary proceeding where the trier of fact, the Appellate Division, which had original jurisdiction, reviewed the entire record. Based upon that review, nineteen charges of professional misconduct were sustained and petitioner's egregious conduct caused him to be disbarred.

III.

THERE WAS NO VIOLATION OF DUE PROCESS WHEN PETITIONER WAS DENIED EXAMINATION OF THE CONTENTS OF A FILE ALLEGEDLY MAINTAINED BY THE CLERK OF THE APPELLATE DIVISION NOR WERE TRANSCRIPTS IN OTHER PROCEEDINGS USED AGAINST PETITIONER.

Petitioner was afforded due process and had the opportunity to cross-examine the numerous witnesses called by respondent. Petitioner's references to transcripts of prior testimony by Howard M. Thaler and Lance H. Falow who were charged in companion disciplinary proceedings, are not only disingenuous but deliberate misrepresentations. He has failed in any of his many attempts to appeal his disbarment to cite any place in the record of the proceeding where this prior testimony was admitted.

These two witnesses were called by respondent as adverse witnesses and, when questioned regarding their prior testimony, they invoked the Fifth Amendment. Petitioner's attorney made no attempt to cross-examine these witnesses. Special Referee Balbach did not admit this prior testimony. In his Post-Trial Memorandum, petitioner argues that certain charges could not be sustained without this testimony.

Respondent, in its Proposed Findings and in its Reply to petitioner's Post-Trial Memorandum, addressed this issue and argued the admissibility of this evidence and that these witnesses had waived their Fifth Amendment privilege by testifying regarding these matters during respondent's investigations. Respondent, however, demonstrated that the only charge that could not be sustained without this prior testimony was Charge Thirty.

Special Referee Monteleone specifically considered this prior testimony only in regard to Charge Thirty and sustained that charge. The Appellate Division did not sustain any of the charges alleging conspiracy to defraud (Charges One, Six, Eleven, Twenty-One) including Charge Thirty. By raising this issue, petitioner clearly demonstrates his machinations in attempting to create due process questions for review.

Regarding an administrative decision suspending a physician from practice, this Court has held that such decision was not subject to a due process attack on the ground that immaterial and prejudicial evidence was introduced where nothing sustained the conclusion that the administrative agency relied upon such evidence. *Barsky v. Board of Regents*, 347 U.S. 442, 453-456 (1954). It is clear that in petitioner's case, such evidence was not admitted or relied upon.

Petitioner has continually raised the specter of a "private file," which he now designates "files maintained on him or used by the Appellate Division." He further claims that there was material including confidential records, *ex parte* communications and *ex parte* evidence which passed between respondent and the Appellate Division and that this may have been used against him.

Petitioner was given the opportunity to review respondent's file as reflected in the transcript of October 25, 1993, pp. 34-37. Petitioner has repeatedly pointed out that it would have no knowledge as to how files are maintained at the Appellate Division. Petitioner's misrepresentations regarding the nature of these records and his assumptions that they were used against him, is another example of his creativity in attempting to fabricate due process issues.

Petitioner was afforded due process. He was served with a Petition. The charges were heard before a Special Referee who had access only to the testimony, documents and other evidence presented by both respondent and petitioner. At the conclusion of the hearing, a Special Referee rendered a report based solely on the evidence presented. The entire record of the hearing was transmitted to the Appellate Division which made an independent assessment of the evidence, as required. Petitioner's real objection is that the Appellate Division found that the record supported a substantial number of the charges and further found that his conduct merited disbarment.

Petitioner alleges that respondent sent the file of his prior disciplinary proceeding in 1979 to the Appellate Division while a motion for interim suspension was pending. Respondent never had the file of the prior disciplinary proceeding against petitioner.

The prior disciplinary proceeding was prosecuted by the Grievance Committee for the Second and Eleventh Judicial Districts. Respondent had only some information from that prior proceeding obtained from the other grievance committee during the investigation of the complaints which form the bases of the charges which resulted in petitioner's disbarment. Such interchange of information between grievance committees is specifically authorized by § 691.6(d) of the Rules of Conduct of Attorneys, Appellate Division, Second Judicial Department.

Respondent did make an application during the investigation of the complaints of professional misconduct for an order to disclose pursuant to Judiciary Law § 90(10) in the form and manner prescribed by the Appellate Division. At that time there were no parties and no disciplinary proceeding pending. Petitioner has pugnaciously ignored the statutory authority for such an order. He also continues to make assumptions regarding the nature of such application and that it was later used against him. While disclosure pursuant to Judiciary Law § 90(10) must be for good cause, such good cause goes to the merits of the application to disclose and not the merits of any potential future application or proceeding.

The evidence against petitioner is that which appears in the record of the disciplinary proceeding at which he was a participant and at which he was represented by counsel. Petitioner has repetitively argued that some information may have been considered by the Appellate Division or the Special Referee which is outside the record of that proceeding. A review of the record, the Report of the Special Referee and the decision of the Appellate Division clearly demonstrate the absurdity of petitioner's position.

Petitioner also claims that he was not given the opportunity to establish affirmative defenses set forth in his answer. This is

likewise patently absurd. The issues regarding alleged "private files" and alleged improper *ex parte* communications were fully litigated in motions and applications before the Special Referee and the Appellate Division, in applications for interlocutory appeals to the Court of Appeals, and in appeals following petitioner's disbarment. Petitioner's attempts to call as witnesses, the attorneys for respondent, the attorney for another grievance committee and a clerk of the Appellate Division were blatant attempts to *inter alia* further delay the disciplinary proceeding, obtain materials with which he and his attorneys had already been provided, and to possibly disqualify counsel to respondent by making them witnesses on his behalf. Petitioner simply disagrees with the rulings of the Special Referee and the Appellate Division and has attempted to transpose these into a denial of due process.

IV.

THE STANDARD OF PROOF IN A DISCIPLINARY PROCEEDING IN NEW YORK IS APPROPRIATE TO THE INTEREST AT STAKE.

Petitioner argues that as a matter of sound public policy this Court should require clear and convincing evidence in all disciplinary cases in order to afford due process. He urges this in view of what he sees as rampant prejudice against the legal profession.

The New York Court of Appeals has held that disciplinary proceedings are to be determined upon a fair preponderance of the evidence and reasonable inferences to be drawn therefrom. *Matter of Capoccia*, 59 N.Y. 2d 549 (1983); *In re Friedman*, 196 A.D. 2d 280 (1st Dept. 1994), *appeal dismissed*, 83 N.Y. 2d 888 (1994), *cert. denied*, 513 U.S. 820 (1994).

Such charges have long been established based on a fair preponderance of the credible evidence. *In re Feola*, 37 A.D. 2d 654 (3rd Dept. 1971); *Matter of Andrews*, 184 A.D. 2d 195 (1st Dept. 1992); *Matter of Friedman*, 196 A.D. 2d 280 (1st Dept. 1994); *A to Z Assocs. v. Cooper*, 161 Misc. 2d 283 (1993).

Indeed, in *Matter of Mogil*, 88 N.Y. 2d 729 (1996), Mogil was charged with making misleading and false statements in connection with the Commission on Judicial Conduct's investigation of his misconduct. The Court of Appeals determined that judicial misconduct was proven by a preponderance of the evidence.

The cases on which petitioner rely involve the denial of personal or liberty interests: civil commitment for a mental disease, *Addington v. Texas*, 441 U.S. 418 (1970); termination of parental right, *Santosky v. Texas*, 455 U.S. 745 (1982); detention without bail in a criminal case, *United States v. Salerno*, 481 U.S. 739 (1987); terminating life-sustaining treatment to an incompetent person in a vegatative state, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

Furthermore, in petitioner's case, respondent demonstrated that, even if it should be determined that the clear and convincing standard were to apply, this standard requires that the evidence makes it highly probably that what is claimed is what actually happened. *Ausch v. St. Paul Fire Ins.*, 125 A.D. 2d 43 (2d Dept. 1987). *Orbit Holding Corp. v. Anthony Hotel Corp.*, 121 A.D. 2d 311 (1st Dept. 1986), lays out what must be proven by that standard:

> that a representation of a material fact was made; that such representation was false, and known to be false by the party making it, or was recklessly made; that such representation was made to deceive and

> to induce the other party to act upon it; and that the party to whom the representation was made relied upon it to its injury or damage.

Respondent, in its Proposed Findings, demonstrated that with each charge involving fraud the evidence presented clearly and convincingly proved these elements.

Petitioner's public policy argument is, likewise, without merit. To afford attorneys a higher form of protection than that afforded to others facing charges in disciplinary systems in New York would further enhance the suspicion with which the legal provision is viewed. This is particularly true since fostering of the attorney/client privilege and protection of a client's confidences and secrets often limit the existence of corroborating evidence. Although, in petitioner's case there was overwhelming evidence to sustain the charges, even apart of the testimony of witnesses.

Petitioner erroneously argues that, since no monetary damages were shown, no wrongdoing occurred. This is not a necessary element of proof in an attorney disciplinary proceeding. The issue is the integrity and fitness of an individual to practice as a member of the bar not the redress of private rights. *Ex parte Wall*, 107 U.S. 265 (1882).

The damage that was amply demonstrated by the various charges sustained against petitioner was the abuse of the trust and confidence reposed in respondent by clients, third parties, courts and other members of the bar. Such misconduct goes to the very heart of the profession and reflects negatively on respondent's fitness to practice law.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY L. CASELLA
Counsel of Record
GRIEVANCE COMMITTEE FOR
THE NINTH JUDICIAL DISTRICT
Attorney for Respondent
399 Knollwood Road
Suite 200
White Plains, New York 10603
(914) 949-4540

MARYANN YANARELLA
Of Counsel